Last page of docket

SHORT PROCEEDINGS AND ORDERS DATE: [06/06/91]

CASE NBR: [90-7435] CSY STATUS: [DECIDED]

SHORT TITLE: [Spencer, James]

VERSUS [Georgia] DATE DOCKETED: [03/29/91]

*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 15 1991	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Apr 25 1991		DISTRIBUTED. May 9, 1991
4	Apr 25 1991	X	Brief of respondent Georgia in opposition filed.
5	May 1 1991		REDISTRIBUTED. May 16, 1991
6	May 14 1991	X	Reply brief of petitioner Spencer filed.
12	May 20 1991		REDISTRIBUTED. May 23, 1991
14	May 24 1991		REDISTRIBUTED. May 30, 1991
16	Jun 3 1991		Petition DENIED. Concurring opinion by Justice Kennedy. (Detached opinion.) Justice Marshall dissenting. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 231 (1976), I would grant certiorari and vacate the death sentence in this case.

1PP

ORIGINAL

90-7435

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, James Lee Spencer, asks leave to file the attached petition for a writ of certiorari to the Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the Supreme

No. 91-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

I, JAMES LEE SPENCER, being first duly sworn, depose and say:

I am the petitioner in the above-entitled case; that in support of my motion to proceed on petition for a writ of certiorari to the Supreme Court of the State of Georgia without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on petition

Court of the State of Georgia. Petitioner's affidavit in support of this motion is attached hereto.

Dated: New York, New York
March 18, 1991

MORRISON & FOERSTER

Charles L. Kerr*
Ann M. Parrent
Laura A. Hastings
1290 Avenue of the Americas
New York, New York 10104
(212) 468-8000

-and-

JOHN P. BATSON
303 10th Street
Augusta, Georgia 30901
(404) 722-8191

Attorneys for Petitioner

* Counsel of Record

N63836

for a writ of certiorari to the Supreme Court of the State of Georgia are the following:

QUESTIONS PRESENTED

I. WHETHER A STATE MAY USE AN EVIDENTIARY RULE OF JUROR INCOMPETENCE TO PRECLUDE CONSIDERATION OF A CAPITAL DEFENDANT'S CLAIM THAT RACE IMPERMISSIBLY AFFECTED HIS SENTENCE OF DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

II. WHETHER A STATE CAN RELY SOLELY ON THE UTLIMATE RACIAL COMPOSITION OF A DEFENDANT'S JURY TO PRECLUDE THAT DEFENDANT FROM ESTABLISHING A PRIMA FACIE CASE OF RACIAL DISCRIMINATION UNDER BATSON V. KENTUCKY.

III. WHETHER A STATE COURT MAY CIRCUMVENT THIS COURT'S MANDATE IN BECK V. ALABAMA BY REINTERPRETING ITS STATE'S SUBSTANTIVE CRIMINAL LAW ON A CASE-BY-CASE BASIS TO PRECLUDE THE AVAILABILITY OF A LESSER INCLUDED OFFENSE AS A MATTER OF LAW.

IV. WHETHER A STATE COURT MAY PREVENT A CAPITAL DEFENDANT FROM INTRODUCING RELEVANT MITIGATING EVIDENCE IN THE SENTENCING PHASE BY DENYING A SHORT CONTINUANCE TO PERMIT A MITIGATION WITNESS TO ARRIVE AND TESTIFY.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No. My last employment was in 1969. I do not recall how much I was paid per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

   No.

3. Do you own any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   No.

5. List the persons who are are dependent upon you for support and state your relationship to those persons:

   None.

6. I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

James Lee Spencer
JAMES LEE SPENCER

Subscribed and Sworn to before me this 13th day of March, 1991.

Harriet P. Morris
Notary Public

My Commission Expires:

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Associate Justice

M60257

ORIGINAL

No. 90-7435

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

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PETITION FOR A WRIT OF CERTIORARI
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JAMES LEE SPENCER,

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THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner, James Lee Spencer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Georgia entered in this case.

OPINION BELOW

The opinion of the Supreme Court of Georgia was announced on November 21, 1990. Spencer v. State, 260 Ga. 640, 398 S.E.2d 179 (1990). A copy of the opinion is reproduced in the Appendix at a1 to a25.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on November 21, 1990. Petitioner filed a timely petition for reconsideration which was denied on December 19, 1990. A copy of the Order denying Petitioner's Motion for Reconsideration is reproduced in the Appendix at a26. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257, petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions are the Eighth and Fourteenth Amendments of the United States Constitution, which are reproduced in full in the Appendix at a42 to a44. Also relevant are the Official Code of Georgia §§ 16-5-1, 16-5-2, and 17-9-41, and Georgia Uniform Superior Court Rule 34, reproduced in relevant part in the Appendix at a45 to a50.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

In January 1975, petitioner James Lee Spencer was convicted of aggravated assault, murder and escape and sentenced to death in the Superior Court of Burke County,

Georgia. On direct appeal, the Georgia Supreme Court affirmed. Spencer v. State, 236 Ga. 697, 224 S.E.2d 910, cert. denied, 429 U.S. 932 (1976).

Mr. Spencer filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. After an evidentiary hearing, the Superior Court denied relief and the George Supreme Court affirmed. Spencer v. Hopper, 243 Ga. 532, 255 S.E.2d 1, cert. denied, 444 U.S. 855 (1979).

Mr. Spencer then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Georgia, and the court denied relief. Mitchell v. Hopper, 538 F. Supp. 77 (S.D. Ga. 1982). On appeal, a panel of the United States Court of Appeals for the Eleventh Circuit vacated the judgment below and remanded for further proceedings. Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983). Upon rehearing en banc, the Court of Appeals withheld the panel's decision, reversed the decision below, and remanded for further proceedings. Spencer v. Kemp, 729 F.2d 1293, 781 F.2d 1458 (11th Cir. 1986). On remand the District Court found that Mr. Spencer's conviction and sentence of death were the result of a racially discriminatory jury selection process. It issued an order directing that Mr. Spencer be released from custody unless the State of Georgia retired and convicted him within

180 days. Spencer v. Kemp, CV-179-247 (S.D. Ga. Mar. 31, 1987).

Mr. Spencer was retried in Burke County, Georgia and convicted of aggravated assault, murder and escape and sentenced to death on September 3, 1987. On direct appeal, the Georgia Supreme Court, by order dated May 25, 1989, remanded to the Superior Court for a hearing in view of this Court's decision in Johnson v. Mississippi, 486 U.S. 578 (1988). Following the remand hearing, the Georgia Supreme Court affirmed Mr. Spencer's convictions and sentence of death. Spencer v. State, Appendix at a1, 260 Ga. 640, 398 S.E.2d 179 (1990).

B. Material Facts

On October 31, 1974, Mr. Spencer, a twenty-four year old black man, was serving a life sentence in the Georgia state prison in Reidsville, Georgia. At that time Reidsville was tense, overcrowded and dangerous and, despite a federal court order requiring integration throughout the Georgia State prison system, remained a racially segregated facility. Tr. at 869-70; R. at 854-59. Mr. Spencer sought to escape from this explosive atmosphere, first in May 1974, and again on October 31, 1974. Tr. at 1086; R. at 2.

The second escape attempt occurred while Mr. Spencer was being transported to Reidsville by a deputy sheriff, Hunter Beazley, and the deputy's father-in-law,

Lett Williams. Mr. Spencer had secreted a homemade handcuff key and a gun on his person to facilitate his escape. As the deputy drove through Waynesboro, Georgia, a call came over the police radio speaker informing the deputy that his prisoner had a gun. As the deputy reached toward his .357 Magnum on the dashboard, Mr. Spencer panicked and began shooting, hitting the deputy. The car stopped, and Beazley and Williams both got out of the car, on the ground and out of the line of fire. Beazley's gun remained on the dashboard. A witness at the scene testified that he heard Beazley, lying on the ground, tell Williams, "Get the gun and help me." R. at 924-26. Williams started back into the car and began to reach toward the gun. R. at 926. Mr. Spencer warned Williams to stay away. As Williams lunged toward the gun, Mr. Spencer shot him. Tr. at 712-13, 716-17.

Given that Mr. Spencer's first conviction has been reversed because of a racially discriminatory jury selection process and the long history of racial problems in Burke County,[1] a careful sensitivity to avoiding racial considerations during Mr. Spencer's second trial was essential. Unfortunately, that did not happen. On several occasions during voir dire, the trial court interfered with the defense counsel's attempts to elicit indications of

---

1 See Rogers v. Lodge, 458 U.S. 613, 624-26 (1982).

racial bias. E.g., Tr. at 43, 266-67. Once the venire had been chosen, the prosecutor struck a total of nine jurors, all of whom were black. Despite this overwhelming pattern of racially discriminatory strikes, the trial court stated that he saw no evidence of any violation of this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986):

> THE COURT: Of course, I advised counsel about that [Batson] in the beginning, and I saw no evidence of that. If you want to make any record, I'll let you make it at this time.
>
> MR. ALLEN: Your Honor, I would like to just reserve that objection, if I may. I really haven't had a chance to even consider it at this moment in time.
>
> THE COURT: All right, sir, there's no objection at this time. All right.

Tr. at 617-18 (emphasis added).

At trial, Mr. Spencer took the stand and described the circumstances of the crime. He did not deny that he intentionally fired the shot that killed Williams, but denied that he acted with any malice or that he even wanted or planned to kill anyone. He further testified that he warned Williams to get away from the car, Tr. at 847, and shot him in panic only when Williams reached for Beazley's loaded .357 Magnum pistol on the front of the dashboard, Tr. at 847, 850-51. Mr. Spencer's version of events was corroborated by other witnesses called by the State. Despite repeated requests by defense counsel, however, the

trial court refused to charge the jury for the noncapital offense of voluntary manslaughter. Tr. at 889-90, 896.

Mr. Spencer's jury returned a verdict of malice murder at approximately 12:30 p.m. on September 3, 1987. Tr. at 945. The sentencing phase began immediately after the lunch break that same day. Tr. at 946. Mr. Spencer's principal mitigation witness was Leah Kirtland, a woman living in Portland, Oregon, who had come to know Mr. Spencer over a ten year period through correspondence, telephone calls and visits to the prison. Appendix at a32 to a35; see Transcript of Hearing on Motion for New Trial, dated September 22, 1988 at 103 ("9/22/88 Tr."). Ms. Kirtland was flying in on the afternoon of September 3, as defense counsel expected her testimony to be required on the next day during the sentencing phase.

On the day Ms. Kirtland was to arrive, it became apparent that the trial would end sooner than either defense counsel or the trial court had expected. Tr. at 611, 946-52. Defense counsel informed the trial court at the beginning of the sentencing phase of Ms. Kirtland's anticipated arrival and requested a brief continuance to permit her to testify after she arrived that day on a 3:55 p.m. flight. Tr. at 947-52. The trial court refused, more concerned with the potential inconvenience to the trial

spectators and television cameras than with Mr. Spencer's right to present mitigating evidence:

> The question here is we've got all of these other people that are indisposed as a result of what's happening here and they've been here as many days as they've been here listening to the jury being selected and listening to the trial of the case and they're here and all of the people are here guessing about a verdict.

Tr. at 948. When defense counsel continued to press for a continuance, the trial court again refused, stating the following reason for the record:

> This case, I guess it's been pending for a long period of time. It's been hanging [around] for too many years and it's got to be disposed of.

Tr. at 973-74. Ms. Kirtland arrived during defense counsel's closing argument. Tr. at 871. The court was informed of Ms. Kirtland's presence, Tr. at 1026, but failed to reopen the record to permit her to testify. After deliberating briefly, the jury sentenced Mr. Spencer to death. Tr. at 1028-29.

After the trial, Mr. Spencer's trial counsel withdrew and new counsel made a motion for new trial. As part of that motion, Mr. Spencer renewed the previously reserved Batson objection, and the trial court considered and rejected that claim on the merits. R. at 201-02, 242-43, 722-23, 892. Mr. Spencer also submitted the affidavit of a juror demonstrating that racial

discrimination was an important factor in the jury's decision to convict and sentence him to death. The affidavit stated:

> During jury deliberations in the guilt/innocence phase, a white female juror made racially derogatory statements in the jury room, including the statement, referring to the defendant, that "A nigger deserves to be dead." . . . Another white juror . . . also made similar racially derogatory comments about the defendant during jury deliberations. I have personally known [that juror] for many years and believe him to be racially prejudiced.
>
> Based on those juror statements and my observations as a juror in the jury room, I know that defendant's race was an important factor in certain juror's decisions to convict defendant and sentence him to death.

Appendix at a30 to a31. The trial court refused even to consider this evidence and summarily rejected Mr. Spencer's Equal Protection and Eighth Amendment claims.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal issues that Mr. Spencer raises in this petition concern fundamental Constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution. All of these issues were presented to the Georgia Supreme Court in Mr. Spencer's appellate briefs challenging his conviction and death sentence. In a written opinion, the Georgia Supreme Court rejected those federal

Constitutional claims and affirmed the conviction and death sentence. See Appendix at a1 to a25.

REASONS FOR GRANTING THE WRIT

I.

THE GEORGIA SUPREME COURT IMPROPERLY APPLIED THE EVIDENTIARY RULE OF JUROR INCOMPETENCE TO FORECLOSE PETITIONER'S OPPORTUNITY TO PROVE THAT HIS RACE WAS A FACTOR IN HIS DEATH SENTENCE

The Georgia Supreme Court barred Mr. Spencer from submitting evidence that his race was a factor in the jury's decision to impose the death sentence by invoking the Georgia evidentiary rule forbidding the admission of juror affidavits to impeach their verdict. As a result, Mr. Spencer is under a death sentence that is tainted by racial considerations but he is prevented from proving it.

In McCleskey v. Kemp, 481 U.S. 279 (1987), this Court reaffirmed its "unceasing efforts to eradicate racial discrimination from the criminal justice system." Id at 309-10 & n.30. In that case, a defendant who had been sentenced to death by the Georgia courts challenged his death sentence under the Equal Protection Clause and the Eighth Amendment. Using the results of a statistical study (the "Baldus study"), McCleskey argued that his sentence had been imposed on the basis of his race and the race of his victim. While accepting the premise of his claim that race

should have no role in the sentencing process, this Court refused to find that McCleskey's conviction and sentence of death were unconstitutional because of McCleskey's failure to submit proof that racial considerations were a factor in his case.

This Court first held that the Baldus study was insufficient evidence to support an inference that racial considerations played a part in McCleskey's sentence in violation of the Equal Protection Clause. To prove the "existence of purposeful discrimination" for purposes of an Equal Protection claim, the Court required McCleskey to "prove that the decisionmakers in his case acted with discriminatory purpose." Id. at 292 (emphasis in original). The Court thus rejected McCleskey's claim because he offered "no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." Id. at 292-93.

This Court also refused to find an Eighth Amendment violation, holding that the Baldus study alone did not "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process." Id. at 313. As with McCleskey's Equal Protection claim, the Court was concerned that purely statistical evidence does not supply sufficient proof that race plays a role in any particular case.

> Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case.

Id. at 308 (emphasis in original).

Mr. Spencer submitted to the trial court the evidence specific to his own case that was lacking in McCleskey. He presented a juror affidavit stating that two jurors in the jury room made racially derogatory remarks about Mr. Spencer, including: "A nigger deserves to be dead." Appendix at a30. The affidavit also states the affiant's belief that race was an important factor in certain jurors' decision to convict Mr. Spencer and sentence him to death. Id. at a31. This evidence clearly demonstrates a constitutionally significant risk that racial bias affected the capital sentencing decision in Mr. Spencer's case, in violation of the Eighth Amendment. McCleskey v. Kemp, 481 U.S. at 313. It also "support[s] an inference that racial considerations played a part in [Mr. Spencer's] sentence" necessary to make out an Equal Protection claim. Id. at 292-93.[2] Thus, the affidavit is the very type of evidence which this Court's decision in

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2 In connection with his motion for new trial, Mr. Spencer filed an Omnibus Motion to Obtain Information Concerning the Existence of Racial Bias on the Part of the Jury, the District Attorney's Office or the Court During Trial and Sentencing. R. at 169-78. The trial court denied that motion in its entirety. R. at 672-73.

McCleskey compels a defendant to proffer to establish his constitutional claims that a sentencer's decision was based on racial considerations.

The trial court refused to consider the juror affidavit at all. 9/22/88 Tr. at 128. The Georgia Supreme Court affirmed the trial court's decision on the basis of a Georgia evidentiary rule which provides: "The affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A. § 17-9-41. Unlike the trial court, however, the Georgia Supreme Court examined the affidavit for the purpose of determining whether the evidentiary rule should be disregarded. The court found the affidavit to be insufficient for this purpose because "it shows only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die." Appendix at a8, 260 Ga. at 644, 398 S.E.2d at 185.

The effect of the Georgia Supreme Court's decision is to bar a defendant from proving with direct evidence that a jury which sentenced him to death did so because of his race. The Georgia Supreme Court's reliance on the verdict impeachment rule amounts to a denial of Mr. Spencer's rights recognized in McCleskey. "[W]here the Supreme Court holds that a particular series of events, when proven, violates a defendant's constitutional rights, implicit in that

determination is the right of the defendant to prove facts substantiating his claim." People v. De Lucia, 20 N.Y.2d 275, 278, 229 N.E.2d 211, 213, 282 N.Y.S.2d 526, 528 (1967); see Green v. Georgia, 442 U.S. 95, 97 (1979); Herbert v. Lando, 441 U.S. 153, 169-70 (1979). While the rule precluding a jury from impeaching its own verdict is based on valid and important policies, it must give way in light of this Court's "unceasing efforts to eradicate racial discrimination" from the criminal justice system. McCleskey v. Kemp, 481 U.S. at 309 & n.30; Batson v. Kentucky, 476 U.S. 79, 85 (1986); Wayte v. United States, 470 U.S. 598, 608 (1985); Vasquez v. Hillery, 474 U.S. 254, 259-62 (1986). The Georgia Supreme Court's refusal to disregard this rule in the face of direct evidence that the decisionmakers in this case sentenced Mr. Spencer to death because he is black eviscerates the constitutional protections and policies this Court reaffirmed in McCleskey.

Perhaps recognizing that its evidentiary ruling would prevent Mr. Spencer from asserting his Constitutional claim, the Georgia Supreme Court sought to justify its decision by noting that the affidavit does not establish that racial prejudice "caused" the jurors to convict Mr. Spencer and sentence him to die. Appendix at a8, 260 Ga. at 644, 398 S.E.2d at 185. In so doing, the Georgia Supreme Court's decision imposes a burden of proof at odds

with the standard applied by this Court in McCleskey. In McCleskey, the Court required the defendant to produce evidence supporting either an inference of racial discrimination or a constitutionally significant risk that race affected the sentencing decision. 481 U.S. at 297, 313. This Court did not require the defendant to conclusively prove that racial prejudice caused his death sentence, as the Georgia Supreme Court demands. Such a burden would be all but impossible to meet in a capital case, where, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Turner v. Murray, 476 U.S. 28, 35 (1986).

The fact that the Georgia Supreme Court based its decision on the evidentiary rule preventing jurors from impeaching their verdicts does not justify the additional burden. First, in contrast to the Georgia Supreme Court's interpretation, other courts have held that evidence of racial bias is among the exceptions to the rule of juror incompetence. See Dobbs v. Zant, 720 F. Supp. 1566, 1573 (N.D. Ga. 1989) (citing Rushen v. Spain, 464 U.S. 114, 121 n.5 (1983)); Tobias v. Smith, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979). If this is correct, then the Georgia Supreme Court should have considered the affidavit as

competent evidence under the standards articulated by this Court in McCleskey.

Second, in addition to the statements made during deliberation, the juror's affidavit in this case also establishes the racial bias of a fellow juror based on information acquired outside the jury room. See Appendix at a30 ("I have personally known [the juror] for many years and believe him to be racially prejudiced."). This evidence was admissible to support Mr. Spencer's McCleskey claims, notwithstanding the rule of juror competence. See Dobbs v. Zant, 720 F. Supp. at 1573.

Finally, even if the rule of juror incompetence is applicable, it is error to interpret it in a manner that increases the defendant's initial burden under McCleskey. This Court has held that applying an evidentiary rule to prevent a capital defendant from asserting his Eighth Amendment rights is a denial of due process. Green v. Georgia, 442 U.S. 95, 97 (1979) ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment."). The Georgia Supreme Court recognized here, as it has previously, this due process limitation on the rule of juror incompetence. Appendix at a7, 260 Ga. at 643-44, 398 S.E.2d at 184; Williams v. State, 252 Ga. 7, 310 S.E.2d

528 (1984); see also Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987). Thus, applying the rule in a manner that increases a capital defendant's burden under McCleskey would be a denial of due process.

Under the standards of McCleskey, the juror affidavit in this case was sufficient evidence to establish prima facie violations of both the Equal Protection Clause and the Eighth Amendment, particularly when viewed in light of the other evidence of racial considerations. First, of course, Mr. Spencer is in the category of defendants determined by the Baldus study to be the most likely to receive the death penalty in Georgia -- he is black, his victim was white. See McCleskey v. Kemp, 481 U.S. at 286-87. Second, the Georgia courts simply ignored the additional evidence that racial discrimination affected Mr. Spencer's case, including: (1) the prosecutor's use of his peremptory challenges to remove only blacks from the jury; (2) the trial court's restriction of defense counsel's questioning of veniremen as to the existence of racial bias; and (3) the recent history of racial discrimination in Burke County, Lodge v. Buxton, 639 F.2d 1358, 1381 (5th Cir. Unit B Mar. 1981), aff'd sub nom. Rogers v. Lodge, 458 U.S. 613 (1982).

The Court should grant certiorari to decide whether Georgia can apply its rule against impeachment of a verdict

to bar valid claims under the Eighth Amendment and the Equal Protection Clause. The Court should also decide whether, even if the rule is valid, its application in this case imposes a impermissibly high standard of proof on a capital defendant who seeks to prove that race was a constitutionally forbidden factor in his death sentence.

II.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG LOWER COURTS AS TO WHAT CONSTITUTES A PRIMA FACIE CASE OF RACIAL DISCRIMINATION UNDER BATSON V. KENTUCKY

During voir dire, the State used a total of nine peremptory challenges and struck only blacks from the jury venire. R. at 722. That pattern of strikes, examined in light of Mr. Spencer's race, the race of his victim, and the improper impact that race has had on prior proceedings in this case and in Burke County, raised an interference of purposeful discrimination in violation of Batson v. Kentucky, 476 U.S. 79 (1986). The trial court, without even requiring the district attorney to come forward with a neutral explanation for his use of those peremptory challenges, rejected Mr. Spencer's challenge under Batson.[3] The Georgia Supreme Court affirmed.

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3 In connection with his motion for new trial, Mr. Spencer filed a Motion to Compel The District Attorney to Produce A Record Of Its Use of Peremptory Strikes To Remove Jurors
FOOTNOTE 3 CONTINUED ON NEXT PAGE

In Batson, this Court recognized that purposeful exclusion of members of a defendant's race from the jury selected to try him is a violation of the Fourteenth Amendment. The Court held that a defendant could make out a prima facie Equal Protection Clause violation by showing that the prosecutor had exercised peremptory challenges to remove prospective jurors of the defendant's race which, under the circumstances of the defendant's case, raised an inference that the jurors were excluded on account of their race. 476 U.S. at 96. As one example, the Court stated that an inference of discrimination might arise upon a defendant's showing of "a 'pattern' of strikes against black jurors included in the particular venire." Id. at 97.

In this case, the trial court relied on the ultimate racial composition of the jury -- six black, six white -- rather than examining the selection process to conclude that there had been no Batson violation. See 9/22/88 Tr. at 84. In affirming the decision on appeal, the Georgia Supreme Court, like the trial court, noted that "the trial jury was evenly split racially." Appendix at a5 n.2,

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FOOTNOTE 3 CONTINUED FROM PREVIOUS PAGE
From Jury Panels And All Notes From Jury Voir Dire In All Cases Where The Death Penalty Was Or Could Have Been Sought. R. at 151-54. The trial court denied that motion in its entirety. R. at 664-65. Cf. Wise v. State, 179 Ga. App. 115, 346 S.E.2d 393 (1986) (case remanded to trial court to require same District Attorney who tried Mr. Spencer to explain action in striking all black jurors).

260 Ga. at 643 n.2, 398 S.E.2d at 184 n.2. As an alternative ground for its decision, the Georgia Supreme Court held for the first time that Mr. Spencer's Batson claim was not preserved for review, even though it had been addressed on the merits by the trial court. Appendix at a5, 260 Ga. at 643, 398 S.E.2d at 184.

A. The Ultimate Racial Composition of the Jury Does Not Preclude a Prima Facie Case under Batson v. Kentucky

The Georgia Supreme Court has consistently rejected prima facie proof of a Batson claim by focusing exclusively on the racial composition of the jury that was ultimately selected, despite a clear pattern of peremptory challenges by the prosecutor against blacks. Out of numerous cases in which the Georgia Supreme Court has been required to decide whether the defendant had presented a sufficient prima facie case, the court found the defendant's showing to be sufficient in only a single instance -- where the prosecutor used ten peremptory challenges to strike ten black jurors in the venire, leaving an all white jury. Gamble v. State, 257 Ga. 325, 357 S.E.2d 792 (1987). In the remaining cases, the court refused to find a prima facie case based solely on the presence of blacks on the jury. Spencer v. State, Appendix at a5 n.2, 260 Ga. at 643 n.2, 398 S.E.2d at 184 n.2 (six blacks served on jury); Moody v. State, 258 Ga. 818, 375 S.E.2d 30 (1989) (no prima facie case where

prosecutor used five peremptory challenges against blacks but four blacks served on jury); Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988) (no prima facie case where prosecutor used six regular and one alternate peremptory challenge against blacks but four blacks served on jury), cert. denied, 109 S. Ct. 3261 (1989); Aldridge v. State, 258 Ga. 75, 365 S.E.2d 111 (1988) (no prima facie case where prosecutor used seven regular and both alternate peremptory challenges against blacks but three blacks served on jury); Williams v. State, 257 Ga. 788, 364 S.E.2d 569 (1988) (no prima facie case where jury was composed of seven blacks, five whites and two black alternates); Mincey v. State, 257 Ga. 500, 504, 360 S.E.2d 578, 582 (1987) (no prima facie case where prosecutor used seven of ten peremptory challenges against blacks but three blacks served on jury).

The Georgia Supreme Court's focus on the result rather than the process of selection permits a prosecutor to discriminate with impunity so long as he leaves some number of blacks on the jury. That is contrary to this Court's decision in Batson, which focused on discrimination in the selection of jurors as the basis for an Equal Protection claim, not whether the resulting jury includes blacks or whites.

> In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in Strauder recognized, . . . that a defendant has no right to a "petit jury composed in whole or

> part of persons of his own race." . . . But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.
>
> . . . Those on the venire must be "indifferently chosen," to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice."

476 U.S. at 85-87 (citations and footnotes omitted).

The Georgia Supreme Court's emasculation of Batson conflicts with application of this Court's Batson decision in other jurisdictions. It is well-recognized by other courts that the presence of blacks on the jury ultimately selected does not preclude a prima facie case under Batson. United States v. Clemons, 843 F.2d 741, 748 (3d Cir.), cert. denied, 488 U.S. 835 (1988); United States v. Johnson, 873 F.2d 1137, 1139 (8th Cir. 1989); United States v. Romero-Reyna, 867 F.2d 834, 837 (5th Cir. 1989), cert. denied, 110 S. Ct. 1818 (1990); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987); State v. Collier, 553 So. 2d 815, 819 (La. 1989).

In other jurisdictions, the prosecutor's pattern of strikes in Mr. Spencer's case, standing alone, would have established a prima facie case of discrimination. See United States v. Alvarado, 923 F.2d 253 (2d Cir. 1991); Tolbert v. State, 315 Md. 13, 553 A.2d 228, 230 (1989); State v. Slappy, 522 So. 2d 18 (Fla.) (use of four of six peremptories to strike blacks established prima facie case),

cert. denied, 487 U.S. 1219 (1988); State v. Belnavis, 246 Kan. 309, 787 P.2d 1172 (1990) (prosecutor's use of peremptory challenges against two black prospective jurors, without more, was sufficient to establish a prima facie case).

This Court should grant certiorari in this case to resolve the conflict among the courts as to what constitutes a prima facie case of discrimination and to ensure that a defendant tried in the Georgia courts enjoys no lesser protection under Batson than defendants tried in other jurisdictions.

B. The Georgia Court's Finding of Procedural Default Does Not Bar This Court's Review of Petitioner's Batson Claim.

The Georgia Supreme Court's finding of procedural default in this case is not an adequate and independent state ground barring this Court's review of Mr. Spencer's Batson claim. In Ford v. Georgia, 59 U.S.L.W. 4111, 4115 (Feb. 19, 1991) (No. 87-6796), this Court unanimously rejected the Georgia Supreme Court's attempt to apply a state procedural bar to a Batson claim, holding that the rule applied was not "firmly established and regularly followed" and therefore was not an adequate and independent state rule under James v. Kentucky, 466 U.S. 341 (1984). This case, like Ford, presents another arbitrary and

inadequate procedural bar erected by the Georgia Supreme Court to preclude review of a legitimate Batson claim.

In the trial court, the possibility of a Batson claim was raised and discussed by defense counsel and the trial court after the jurors were chosen but prior to the time the jurors were sworn. See State v. Sparks, 257 Ga. 97, 98, 355 S.E.2d 658, 659 (1987). The trial court, however, headed off any attempt by defense counsel to raise a Batson claim by stating "I saw no evidence of that." Tr. at 617. Defense counsel then asked for an opportunity to "reserve that objection" so that he could consider the Batson claim further, and the trial court agreed. Id. at 618. The District Attorney did not question the trial court's decision at that time.

Mr. Spencer renewed his Batson claim in his motion for new trial. At that time, Mr. Spencer submitted and relied upon the proof the Georgia Supreme Court requires to assert such a claim. See R. at 272, 437-40; see also Aldridge v. State, 258 Ga. 75, 365 S.E.2d 111 (1988). At the September 1988 hearing on Mr. Spencer's motion for new trial, the State did not argue that the Batson claim had been waived. Following that hearing, the trial court considered and rejected Mr. Spencer's Batson claim on the merits. Appendix at a27 to a28.

On appeal, the Georgia Supreme Court ignored the trial court's decision. Instead, the Georgia Supreme Court seized upon the colloquy at the end of jury selection as a basis for finding that the objection was procedurally barred.

> [T]he trial court did not explicitly allow counsel to reserve his objection; the court only noted there was no objection "at this time." Even if the court's response were liberally construed to implicitly grant the defendant some additional time to "make [a] record," we do not think the court's response can be interpreted reasonably to allow the defendant to wait until his fourth amended motion for new trial to raise a Batson issue.

Appendix at a5, 260 Ga. at 642, 398 S.E.2d at 183.

The Georgia Supreme Court's reconstruction of the record is, of course, directly contrary to what the trial court actually did. During the Unified Appeal Procedure hearing following the striking of the jury, the trial court permitted defense counsel to reserve his right to raise a Batson objection until sometime later in the proceedings. The Batson claim was expressly asserted by Mr. Spencer in his motion for new trial, and at the hearing on that motion the State offered no evidence and submitted no papers in opposition. After allowing the parties an additional week to submit further evidence or arguments, the trial court issued an order denying Mr. Spencer's motion in its entirety, stating: "The Court has further examined all of the other grounds set forth in the defendant's motion and it

finds them individually and collectively to be without merit." Appendix at a28.

The Georgia Supreme Court's decision is contrary to the "firmly established and regularly followed state practice" applied by Georgia in capital cases. See James v. Kentucky 466 U.S. 341, 348-51 (1984). The Unified Appeal Procedure used by the Georgia courts in death penalty cases requires that any doubt be resolved in a manner that avoids waiver where the waiver is not clear from the record. Uniform Superior Court Rule 34.2(B)(2) provides:

> In the event defense counsel intends to allow a deadline to pass without first presenting an issue for decision, the court shall question defense counsel in the presence of the defendant to determine whether or not defense counsel has explained to the defendant his rights regarding that issue and whether defense counsel and the defendant have agreed not to assert the issue. There questions put to defense counsel by the court and the responses of defense counsel shall be taken down and transcribed by the official court reporter to the end that it will be established that the right of the defendant is being waived knowingly, voluntarily and intelligently after due consideration by the defendant and defense counsel.

Ga. Super. Ct. R. 34.2(B)(2). At the motion for new trial stage, the trial court is further obligated to ensure that the record or transcript of proceedings reflects a knowing, voluntary and intelligent waiver by the defendant if the defendant allowed a deadline for issue presentation to pass

without presenting the issue. Ga. Super. Ct. R. at 34.5(A)(11).

Here, the trial court did not question defense counsel to establish that Mr. Spencer knowingly, voluntarily and intelligently waived his Batson claim. Instead, the trial court permitted defense counsel to reserve his Batson objection and, when that claim was asserted later, denied it on the merits. The Georgia Supreme Court's finding of waiver on that record is contrary to the procedural rules in the Uniform Appeals Procedure as well as the duty the Georgia Supreme Court has assigned itself under those rules. See Newland v. State, 258 Ga. 172, 174, 366 S.E.2d 689, 692 (under Unified Appeal Procedure, Supreme Court has affirmative duty to consider assertions of error raised in trial courts), cert. denied, 488 U.S. 975 (1988). Thus, the finding of waiver in this case is not based on "firmly established and regularly followed state practice" and therefore is not an independent and adequate state procedural rule barring federal review of Mr. Spencer's Batson claim. Ford v. Georgia, 59 U.S.L.W. at 4114-15.

III.

THE MANDATE OF BECK V. ALABAMA CANNOT BE AVOIDED BY REINTERPRETING THE VOLUNTARY MANSLAUGHTER STATUTE.

Under Georgia law, the crime of voluntary manslaughter is a lesser-included offense of murder. Washington v. State, 249 Ga. 728, 730, 292 S.E.2d 836, 838 (1982). During his trial, Mr. Spencer unsuccessfully requested the trial court to charge the jury on voluntary manslaughter. Tr. at 889-90, 896. The trial court's refusal to charge this lesser-included offense violated Mr. Spencer's rights under the Eighth and Fourteenth Amendments. Beck v. Alabama, 447 U.S. 625 (1980). When Mr. Spencer raised this issue on appeal, the Georgia Supreme Court cited to the facts which supported the voluntary manslaughter charge, Spencer v. State, Appendix at a5 to a6, 260 Ga. at 643, 398 S.E.2d at 184, but sua sponte reinterpreted its voluntary manslaughter statute to bar its application in this case as a matter of law. The result is to render Beck v. Alabama meaningless by refusing to recognize the existence of a lesser-included offense as a purported matter of state law. Thus, this case presents the same issue currently under consideration by this Court in Schad v. Arizona, 111 S. Ct. 243 (1990) (order granting certiorari).

In Beck this Court held that a defendant in a capital case is entitled to a jury instruction on a lesser-included offense when the evidence warrants such a charge. Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Hopper v. Evans, 456 U.S. 605 (1982).

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

Beck v. Alabama, 447 U.S. at 637.

Mr. Spencer was charged with the capital offense of malice murder,[4] and therefore was entitled to an instruction on the lesser-included offense of voluntary manslaughter if it was supported by any evidence in the record.[5] Under Georgia law, "[w]hen a homicide is neither justifiable nor malicious, it is manslaughter, and if intentional, it is

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4 "A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." O.C.G.A. § 16-5-1(a).

5 "A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as a result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person . . . ." O.C.G.A. § 16-5-2(a).

voluntary manslaughter." Starr v. State, 134 Ga. App. 149, 149, 213 S.E.2d 531, 532 (1975).

> Evidence of voluntary manslaughter may be found in "a situation which arouses sudden passion in the person killing so that, rather than defending himself, he willfully kills the attacker, albeit without malice aforethought, when it was not necessary for him to do so in order to protect himself." Williams v. State, 232 Ga. 203, 204 (206 S.E.2d 37) (1974).

Washington v. State, 249 Ga. 728, 730, 292 S.E.2d 836, 838 (1982).

One of the essential elements the evidence must show is provocation sufficient to create "a sudden, violent and irresistible passion." See O.C.G.A. § 16-5-2. Provocation can be conduct, or words and conduct together, that creates fear of immediate danger in a reasonable man. Washington v. State, 249 Ga. at 730, 292 S.E.2d at 838; Moore v. State, 228 Ga. 662, 663, 187 S.E.2d 277, 278 (1972). The fear engendered by danger is sufficient provocation to excite the passion necessary for voluntary manslaughter. Thomas v. State, 184 Ga. App. 131, 132, 361 S.E.2d 21, 23 (1987); Tew v. State, 179 Ga. App. 369, 346 S.E.2d 833 (1986). "While a belief that the victim was about to reach for a weapon may not result in a finding of justification [self-defense], the fear of some danger can be sufficient provocation to excite passion." Washington v.

State, 249 Ga. at 730, 292 S.E.2d at 838; Thomas v. State, 184 Ga. App. at 132, 361 S.E.2d at 23.

In Georgia a voluntary manslaughter charge must be given if there is any evidence, however slight, as to whether the offense is murder or voluntary manslaughter. Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632, 633 (1986).[6] This rule is consistent with the rationale stated by this Court in Beck for capital cases:

> "A judge may be entirely satisfied from the whole evidence in the case, that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter."

447 U.S. at 635 n.11 (quoting Stevenson v. United States, 162 U.S. 313, 323 (1896)).

In this case, the requested instruction was clearly warranted under existing Georgia law. The evidence introduced at trial showed that Mr. Spencer shot

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6 The Georgia Supreme Court has recently recommended that the Georgia trial courts charge voluntary manslaughter in every case where requested by the defendant because "[s]uch a charge, on request, cannot be reversible error, and if routinely given, would vastly reduce the expense and delay involved on appeal of the sometimes difficult questions of whether there is sufficient evidence to support such a charge as a matter of law." Gooch v. State, 259 Ga. 301, 303 n.2, 379 S.E.2d 522, 524 n.2 (1989).

Mr. Williams in the head and killed him. Tr. at 712-13, 811, 847, 849, 850, 862. Mr. Spencer's trial counsel did not dispute those facts and conceded to the jury that Mr. Spencer killed Mr. Williams. Tr. at 910.

The evidence further showed that Mr. Spencer did not act maliciously in shooting Mr. Williams. Mr. Spencer did not deny that he pointed the gun at Mr. Williams, that he intentionally pulled the trigger or that he intentionally fired the shot that killed him. Tr. at 862; see Tr. at 850. Mr. Spencer also testified that, when he pulled the trigger of the gun, he knew that Mr. Williams would be hurt. Tr. at 850. Mr. Spencer stated, however, that he never wanted or planned to kill anyone and specifically denied that he acted with any malice. Tr. at 848-49, 850, 863; see Tr. at 843 (only wanted gun to facilitate escape). The lack of malicious intent is further demonstrated by Mr. Spencer's warning to Mr. Williams to "get away," Tr. at 847, and by the fact that Mr. Spencer had the opportunity to shoot a number of people who came up to the car, but did not. Tr. at 688, 708-09, 881.

The evidence also supported a finding that Mr. Spencer acted because of a "sudden passion" resulting from "serious provocation." Mr. Spencer testified that he shot Mr. Williams in panic when Mr. Williams lunged for Mr. Beazley's loaded .357 Magnum pistol on the front

dashboard of the vehicle. Tr. at 847, 850-51. See also Tr. at 850 ("Q. You knew what you were doing when you did it? A. No sir, I can't say that I knew what I was doing, no sir."). Mr. Spencer was locked in a cage in the back of Mr. Beazley's vehicle, Tr. at 846, and he testified that he believed that, if he had not shot Mr. Williams, he would have been killed, Tr. at 846-47, 881. Washington v. State, 249 Ga. at 730, 292 S.E.2d at 838; Tew v. State, 179 Ga. App. 369, 346 S.E.2d 833 (1986); Syms v. State, 175 Ga. App. 179, 180, 332 S.E.2d 689, 690 (1985).

Mr. Spencer's version of events was corroborated by other witnesses. One of the State's witnesses, Charlie Padgett, testified that, as he ran up to the car holding Mr. Spencer, the car was rocking back and forth, showing that Mr. Spencer was in an extremely excited state. Tr. at 711. That description was confirmed by another State witness, Trooper Charles Parker, who testified that, when he came upon the scene, Mr. Spencer was in the rear of the vehicle "moving about in a very rapid manner." Tr. at 724. Trooper Parker also confirmed that when he stopped Mr. Spencer immediately after the shooting, he was very nervous and excited. Tr. at 733.

Mr. Padgett also testified that Mr. Spencer only shot Mr. Williams when Mr. Williams stuck his head into the front right door of the vehicle. Tr. at 712-13, 716-17.

Other testimony established that Mr. Beazley's .357 Magnum was on the front dashboard, that it was loaded and that Mr. Williams' actions reaching into the vehicle were consistent with trying to reach for that gun. Tr. at 732, 747-48, 812-15, 826-27. The State's pathologist testified that the shot that killed Mr. Williams struck him just behind the right ear and that the location of the wound was consistent with Mr. Spencer shooting Mr. Williams as he reached into the right front door of the car to get the gun on the dashboard. Tr. at 811-15; see Tew v. State, 179 Ga. App. at 372, 346 S.E.2d at 836 (defendant testifies that victim reached into car to grab him and defendant shot; court held evidence supported voluntary manslaughter conviction).

On appeal, the Georgia Supreme Court did not dispute the description of the crime testified to by Mr. Spencer or the evidence of provocation, conceding that there was evidence in the record showing that Mr. Spencer acted out of fear and panic. Appendix at a2, 260 Ga. at 641, 398 S.E.2d at 182. Thus, under its prior cases the Georgia Supreme Court was faced with a record under which the voluntary manslaughter charge should have been given, see Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632, 633 (1986), and the failure to have done so violated Beck. Nonetheless, the Georgia Supreme Court relied on its

decision in Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188 (1983), to craft sua sponte a new limit on voluntary manslaughter so that such a charge was unavailable in this case as a matter of law.

In Horton, the defendant was convicted of murder, which occurred during the course of a burglary. On appeal, the defendant argued that the trial court erred in refusing to charge voluntary manslaughter. In denying this claim, the Georgia Supreme Court held: "Being discovered during the commission of a burglary is not as a matter of law such provocation as would require a charge on voluntary manslaughter." 249 Ga. at 872, 295 S.E.2d at 284.

In this case, the Georgia Supreme Court expanded the rule of Horton by holding that provocation could not exist as a matter of law because the shooting of Lett Williams occurred in the course of an escape attempt. Having ruled that there was no legal provocation, the Georgia Supreme Court could then circumvent this Court's decision in Beck by simply concluding that "the evidence fails to warrant such a charge." Appendix at a6, 260 Ga. at 643, 398 S.E.2d at 184; cf. Gooch v. State, 259 Ga. 301, 379 S.E.2d 522 (1989) (voluntary manslaughter charge should be given in every case it is requested). By so reinterpreting Georgia's voluntary manslaughter statute, the

Georgia Supreme Court was able to justify the trial court's refusal to give the lesser-included charge even though warranted by the actual evidence developed at trial and the law at that time. Such an unprecedented rule is contrary to the "nearly universal acceptance of the rule [requiring a lesser-included offense instruction] in both state and federal courts." Beck v. Alabama, 447 U.S. at 635-37 & nn.10-12 Given that Mr. Spencer was facing the death penalty, "[t]hat safeguard would seem to be especially important in a case such as this." Id. at 637.

This Court recently granted a petition for certiorari in Schad v. Arizona, 111 S. Ct. 243 (1990) (order granting certiorari), to decide whether a state court can avoid the effect of Beck by failing to recognize the existence of any lesser-included offense under state law. The Georgia Supreme Court's decision in this case represents an even further departure from Beck. The state courts must not be permitted to redefine substantive criminal law on a case-by-case basis for the purpose of eroding the Constitutional protections afforded to a capital defendant. The Court should grant certiorari in this case to halt this evisceration of Beck.

IV.

THE GEORGIA SUPREME COURT'S DECISION AFFIRMING THE TRIAL COURT'S EXCLUSION OF RELEVANT MITIGATING EVIDENCE IS INCONSISTENT WITH THIS COURT'S DECISION IN SKIPPER V. SOUTH CAROLINA

The Georgia Supreme Court upheld the trial court's refusal to grant a two hour continuance to await the arrival of Mr. Spencer's main mitigation witness, who was traveling cross-country to testify on his behalf. The decision effectively precluded the jury from considering relevant mitigating evidence as required by this Court's decision in Skipper v. South Carolina, 476 U.S. 1 (1986). Moreover, the denial of a continuance permitted the jury to impose the death sentence on the basis of evidence and arguments Mr. Spencer had no opportunity to deny or explain, in violation of the "constitutional command that no person shall be deprived of life without due process of law." Gardner v. Florida, 430 U.S. 349, 351 (1977).

A. The Denial of A Continuance That Effectively Deprives A Capital Defendant of An Opportunity To Present Relevant Mitigating Evidence Violates The Eighth Amendment.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), this Court held that the sentencer in a capital case may not be precluded from considering any relevant mitigating evidence that the defendant proffers as a basis for a sentence less than

death. Following Lockett and Eddings, the Court has repeatedly vacated death sentences where it is not clear that the sentencer gave adequate consideration to such evidence or where the sentencer was precluded from considering the mitigating evidence at all. Clemons v. Mississippi, 110 S. Ct. 1441, 1450 (1990) (vacating death sentence because "we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence"); McKoy v. North Carolina, 110 S. Ct. 1227 (1990) (vacating death sentence where North Carolina's unanimity requirement prevented the jury from considering any mitigating factor not unanimously found); Penry v. Lynaugh, 492 U.S. 302 (1989); Mills v. Maryland, 486 U.S. 367 (1988) (reversing death sentence where jurors possibly thought that they were precluded from considering mitigating evidence); Sumner v. Shuman, 483 U.S. 66 (1987) (reversing death sentence for statutory preclusion of consideration of mitigating evidence); Hitchcock v. Dugger, 481 U.S. 393 (1987) (unanimously reversing death sentence for refusal to consider evidence of nonstatutory mitigating circumstances).

In Skipper v. South Carolina, 476 U.S. 1 (1986), the Court reversed the petitioner's death sentence because the jury was not permitted to consider evidence of the petitioner's post-arrest behavior in jail. The Court held

that the trial court's exclusion of this evidence violated the Eighth Amendment because it "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8-9.

In this case, Mr. Spencer sought to present the testimony of Leah Kirtland, a woman who was in a unique position to testify to the many positive changes Mr. Spencer had undergone during his years in prison. Along with her family, Ms. Kirtland had been corresponding with Mr. Spencer on an average of twice a week for nine years preceding the trial. Appendix at a32. Ms. Kirtland had also spoken on the telephone with Mr. Spencer every few months and had traveled from her home in Oregon to visit him in prison on several occasions. Id. at a32, a34. Ms. Kirtland would have testified to the positive changes in Mr. Spencer's personality and attitudes over the nine-year period she had known him. Id. at a36. As in Skipper, the evidence in this case would have permitted the jury to draw favorable inferences regarding Mr. Spencer's character and probable future conduct. See McKoy v. North Carolina, 110 S. Ct. at 1232 (state cannot bar the consideration of mitigating evidence if the sentencer could reasonably find that it warrants a sentence less than death).

The trial court refused to grant a brief continuance to await Ms. Kirtland's scheduled arrival, Tr. at 973-80, even though trial counsel showed that she would arrive within a few hours. Ms. Kirtland in fact arrived during defense counsel's closing argument. Id. at 871. The trial judge was informed of her presence, Tr. at 1026, but failed to reopen the record to allow her to testify.[7] On appeal, the Georgia Supreme Court held that the trial court did not abuse its discretion by refusing to grant the requested continuance. Appendix at a21 to a22, 260 Ga. at 652, 398 S.E.2d at 190.

Precluding Ms. Kirtland from testifying -- by whatever means -- deprived Mr. Spencer of his Eighth Amendment right to present evidence that suggested some basis for a sentence other than death. The Constitution

> requires States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall.

McKoy v. North Carolina, 110 S. Ct. at 1233 (emphasis in original). The fact that the barrier here was the trial

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7 The effect of the trial court's error was compounded because the jury had learned that Ms. Kirtland was expected to testify, Tr. at 947, but was given no explanation of her failure to appear, and she was not identified to them when she did appear. Certainly there is a possibility that the jury drew a negative inference from Ms. Kirtland's failure to appear, possibly imagining that Ms. Kirtland had herself decided against attending because she was unwilling to appear on Mr. Spencer's behalf.

court's denial of a two-hour continuance, rather than an evidentiary ruling as in Skipper, does not change the result. Mr. Spencer's jury was precluded from considering relevant mitigating evidence, and this violated the Eighth Amendment.

B. The Denial of A Continuance That Prevents A Capital Defendant From Denying or Explaining The Evidence Against Him Is A Denial Of Due Process.

The prosecutor argued that Mr. Spencer should be sentenced to death because he posed a future escape risk, based on the fact that he had tried to escape in 1974. As in the case of the witnesses excluded in Skipper, Ms. Kirtland's testimony regarding the change in Mr. Spencer's personality and attitudes would have rebutted the prosecution's arguments on this point. Thus, exclusion of Ms. Kirtland's testimony also violated the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he has no opportunity to deny or explain.'" Skipper, 476 U.S. at 5 n.1 (quoting Gardner v. Florida, 430 U.S. 349, 362 (1977)).

This Court has recognized that the refusal to grant a continuance is a denial of due process if the refusal deprives the defendant of a right guaranteed by the Constitution. Chandler v. Fretag, 348 U.S. 3 (1954); see also Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (while the

matter of a continuance is traditionally within the discretion of the trial judge, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality").

The federal courts have not hesitated to grant federal habeas relief when a state court's denial of a reasonable continuance prevented a defendant from presenting witnesses on his behalf. Bennett v. Scroggy, 793 F.2d 772 (6th Cir. 1986) (granting federal habeas relief where state court denied overnight continuance to enable defendant to procure presence of witness who would testify to victim's reputation for violence, thus supporting defendant's theory of self-defense); Dickerson v. Alabama, 667 F.2d 1364 (11th Cir. 1982) (granting federal habeas relief where state court denied motion for continuance to locate alibi witness whose testimony, while similar to that of other witnesses, was not cumulative because it would have "lent a new aura of credibility" to the alibi defense), cert. denied, 459 U.S. 878 (1983); Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. Unit B Jan. 1981) (granting federal habeas relief where state court refused continuance of six hours to await arrival of expert witness who would have established insanity defense).

This Court has "repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case." Ake v. Oklahoma, 470 U.S. 68, 83 (1985). In Ake, the Court held that due process required the state to bear the cost of providing a defendant with the assistance of a psychiatrist for the purpose of rebutting the state's evidence of future dangerousness at a capital sentencing hearing. Id. at 84. Similarly, in Gardner v. Florida, 430 U.S. at 362, this Court vacated the defendant's death sentence on due process grounds because he had no opportunity to rebut the information in a presentence report considered by the judge who sentenced him to death.

Mr. Spencer's interest in a fair adjudication was as compelling as that of the defendants in Ake and Gardner. There was no countervailing interest substantial enough to warrant denial of the requested continuance.[8] At the time defense counsel requested the continuance, he reported to the trial court that he believed Ms. Kirtland was on her flight to Georgia, which was scheduled to arrive in a few

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8 The special nature of the bifurcated capital trial has led one commentator to suggest that the courts should routinely grant thirty day continuances between the trial and penalty phases in order to ensure an adequate opportunity to prepare for the penalty phase. Abrams, A Capital Defendant's Right to A Continuance Between The Two Phases of A Death Penalty Trial, 64 N.Y.U. L. Rev. 579 (1989).

hours. Tr. at 947-52. This belief was based on a telephone call from Ms. Kirtland that morning, when she told defense counsel's office that she planned to take her scheduled flight. Tr. at 983-84.

In contrast to the profound effect on Mr. Spencer's ability to argue against a death sentence, the requested continuance would have imposed only a minimal burden on the state and the trial court. It is apparent from the record that the chief consideration in the trial court's decision was the pressure he felt from the law enforcement officials,[9] spectators[10] and the press[11] to dispose of a case that had been "hanging [around] for too many years." Tr. at 973-74. Pressure of this sort is not a valid basis for denying a reasonable continuance in a capital case.

This Court should grant certiorari to decide whether the denial of a few hours' continuance to permit a scheduled witness to arrive and testify at the sentencing phase denies a capital defendant his rights under the Eighth and Fourteenth Amendments.

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9 See Tr. at 978-79 (colloquy in which sheriff asks trial court whether to hold motel rooms for jurors that evening, stating he "can kind of guess" how long the deliberations will take once the case goes to the jury).

10 See Tr. at 973 (trial court noting, "We've got these people that are interested in this case that have come from all over everywhere.").

11 See Tr. at 993 (prosecutor's closing argument notes presence of television cameras and news reporters).

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Georgia Supreme Court should be granted.

Dated: March 18, 1991

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: NOV 21 1990

S90P0921. SPENCER v. THE STATE.

BENHAM, Justice.

This is a case in which a death sentence has been imposed. The defendant, James Lee Spencer, originally was convicted and sentenced to death in 1975. The judgment was affirmed. Spencer v. State, 236 Ga. 697 (224 SE2d 910) (1976). However, Spencer obtained federal habeas corpus relief in connection with his challenges to the composition of his grand and traverse juries. See Spencer v. Kemp, 781 F2d 1458 (11th Cir. 1986). He has now been retried, convicted of malice murder, aggravated assault and escape, and sentenced to death.[1]

The crimes occurred on October 31, 1974, while Spencer was being transported in a police-type automobile from Richmond County to the Georgia state prison in Reidsville. The transporting officer's father-in-law rode with them. As they

[1] Spencer was re-indicted on April 29, 1987. He was sentenced to death for murder on September 3, 1987. A motion for new trial was filed on September 27, 1987, and amended several times thereafter. The motion for new trial was denied on October 4, 1988. A motion to reconsider was denied October 19, 1988. The case was argued orally on February 13, 1989. On May 25, 1989, this court remanded the case to the superior court for further proceedings. These proceedings were heard on January 16, 1990, and the trial court issued its ruling on March 28, 1990. The case was redocketed in this court on April 11, 1990, and the case was re-argued on June 25, 1990.

neared Millen, Georgia, a message came over the police radio that Spencer might be armed. He was. He also had a key to his handcuffs. Spencer, who was in the back-seat area of the car, shot the driver five times before he could stop the car, and he and his father-in-law got out. The driver, seriously wounded, lay on the ground outside the car. Spencer tried to kick his way out of the car. (The inside handles had been removed from the rear-seat area of the car.) When the father-in-law reached in to the front-seat area of the car, Spencer shot him in the head, killing him instantly. Finally, Spencer managed to kick out one of the back windows, and exited the car. A state patrolman arrived and apprehended Spencer almost immediately.

Spencer testified at the guilt phase of the retrial. He admitted shooting the transporting officer and the father-in-law. He claimed he did so because he was frightened by the radio message and shot in panic.

The evidence supports the conviction. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

1. (a) In his sixth enumeration of error, the defendant complains of the court's refusal to excuse nine jurors allegedly biased against the defendant.

Four of these nine prospective jurors were not challenged for cause by the defense (Josey, Allen, Broxton and Mulling). The trial court did not err by failing to excuse sua sponte these unchallenged jurors. Childs v. State, 257 Ga. 243, 249 (7) (357 SE2d 48) (1987). We do not find erroneous the trial court's

finding that the remaining five were qualified to serve as jurors. Isaacs v. State, 259 Ga. 717, 730 (21) (386 SE2d 316) (1989).

(b) In his seventh enumeration of error, the defendant contends a prospective juror should have been excused for cause for her attitude about the death penalty. However, she was not challenged at trial and, as above, the trial court did not err by not excusing the juror sua sponte. Childs v. State, supra.

(c) In his eighth and eleventh enumerations, Spencer contends the court erred by excluding for cause five prospective jurors who were conscientiously opposed to the death penalty. We need not consider the court's excusals of two of these prospective jurors (Williams and Lynch), as Spencer did not object at trial to these excusals. See Blankenship v. State, 258 Ga. 43 (2) (365 SE2d 265) (1988). The court's excusals of the other three were within the deference due the trial court's determination under Wainwright v. Witt, 469 U. S. (105 SC 844, 83 LE2d 841) (1985). Jefferson v. State, 256 Ga. 821 (2) (353 SE2d 468) (1987). See also Isaacs v. State, supra (23).

(d) The "scope of the voir dire examination must, of necessity, be left to the sound discretion of the trial judge." Curry v. State, 255 Ga. 215, 218 (2 b) (336 SE2d 762) (1985). We do not find an abuse of discretion in this case, and find no merit to Spencer's claim that the voir dire examination was too restricted (enumeration 12) or that the trial court applied a "double standard" to challenges for cause (enumeration 8).

(e) In his tenth enumeration, Spencer contends the state exercised its peremptory challenges in a racially discriminatory manner. See Batson v. Kentucky, 476 U. S. 79 (106 SC 1712, 90 LE2d 69) (1986). The state answers that Spencer has failed to preserve this issue for review on appeal. Spencer disagrees, claiming the trial court allowed him to reserve the issue.

Before the jury selection began, the trial court reminded the parties of the strictures of Batson, stating: "I hope that you all comply with that, and we won't have any problems with reference to that."

After the jury was selected, the court conferred briefly with the parties to see if there was "anything the court needs to take up prior to the trial...." Near the end of the conference, the prosecutor asked if "there's a Batson objection...." The court spoke to the defendant's attorney about Batson:

> The Court: Of course, I advised counsel about that in the beginning, and I saw no evidence of that. If you want to make any record, I'll let you make it at this time.
>
> Mr. Allen (for the defendant): Your Honor, I would like to just reserve that objection if I may. I really haven't had a chance to even consider it at this moment in time.
>
> The Court: All right, there's no objection at this time. All right. Bring the jury back, please. Excuse me, did you want a break? Let's take a break for about five minutes.

No Batson issue was raised until after trial and after the defendant's trial attorneys had withdrawn and new attorneys entered the case on behalf of the defendant. The issue was raised for the first time in Spencer's fourth amended motion for

new trial. Spencer contends this delay is not fatal to his claim because the trial court "permitted defense counsel to reserve his right to raise a Batson objection until sometime later in the proceedings." However, the trial court did not explicitly allow counsel to reserve his objection; the court only noted there was no objection "at this time." Even if the court's response were liberally construed to implicitly grant the defendant some additional time to "make [a] record," we do not think the court's response can be interpreted reasonably to allow the defendant to wait until his fourth amended motion for new trial to raise a Batson issue.

In Childs v. State, 257 Ga. 243, 257 (21) (357 SE2d 48) (1987), we held: "A Batson issue must be raised in a timely manner, and after trial is too late." See also State v. Sparks, 257 Ga. 97 (355 SE2d 658) (1987). Because Spencer did not raise this issue in a timely manner, the trial court did not decide whether the defendant had made a prima facie case of discrimination and the trial court did not inquire about and the state did not explain its reasons for the exercise of its peremptory challenges. See Gamble v. State, 257 Ga. 325 (357 SE2d 792) (1987). We hold this claim is not preserved for review.[2]

2. The trial court did not err, as Spencer contends in enumeration 13, by refusing to charge the jury on voluntary

[2] We note the trial jury was evenly split racially, and trial counsel testified at the hearing on the motion for new trial that he "did not see a need to raise a Batson challenge."

manslaughter. Horton v. State, 249 Ga. 871 (1) (295 SE2d 281) (1982). Nothing in Beck v. Alabama, 447 U. S. 625 (100 SC 2382, 65 LE2d 392) (1980), requires a trial court to instruct the jury on a lesser offense where the evidence fails to warrant such a charge. Hopper v. Evans, 456 U. S. 605 (102 SC 2049, 72 LE2d 367) (1982).

3. Enumeration 14 alleges Spencer's death sentence was the result of racial discrimination. See McCleskey v. Kemp, 481 U. S. 279 (107 SC 1756, 95 LE2d 262) (1987). Spencer relies upon a post-trial affidavit from one of the jurors stating she overheard two white jurors making racially derogatory comments about the defendant during the jury's deliberations.

The general rule is that "affidavits of jurors may be taken to sustain but not to impeach their verdict." OCGA § 17-9-41. Exceptions are made to this rule in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations. See, e.g., Hall v. State, 259 Ga. 412 (3) (383 SE2d 128) (1989) and cases cited therein. Compare FRE 606 (b).[3]

[3] FRE 606 (b) provides: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these

The affidavit here does not fit within these exceptions to the rule. Compare Shillcutt v. Gagnon, 827 F2d (1155) (II) (7th Cir. 1987). See also Wright and Gold, Federal Practice and Procedure, ch. 7, § 6074, at pp. 431-32. ("Most authorities agree ... that the rule precludes a juror from testifying that issues in the case were prejudged, a juror was motivated by irrelevant or improper personal considerations, or racial or ethnic prejudice played a role in jury deliberations." (Footnotes omitted)).

The rule against allowing jurors to impeach their verdict serves important public interests. The rule discourages post-verdict harassment of jurors, enhances verdict finality and certainty, encourages free and open discussion among jurors during deliberations, and insulates jury value judgments from judicial review. However, these goals are not absolute, and it has been held that the rule of juror incompetency "cannot be applied in such an unfair manner as to deny due process." Shillcutt v. Gagnon, supra at 1159; Williams v. State, 252 Ga. 7 (1) (310 SE2d 528) (1984); Dobbs v. Zant, 720 F. Supp. 1566 (III) (N.D. Ga. 1989). See also Wright and Gold, supra at 437, n. 104 ("It is safe to say that Rushen [v. Spain, 464 U. S. 114 (104 SC 453, 78 LE2d 267) (1983)] at least stands for the proposition assumed in Smith [v. Phillips, 455 U. S. 209 (102 SC 940, 71 LE2d 78) (1982)] that juror testimony as to the effect of bias on decision making may sometimes be received over a Rule 606 (b) objection.")

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purposes."

Spencer contends his affidavit should have been considered notwithstanding the rule of exclusion, and that his conviction and death sentence should be reversed on the basis of the affidavit. We disagree.

> In cases too numerous to mention, the courts have moved decisively against procedures that attach a badge of inferiority to certain groups. This protection is needed even more critically in the courtroom setting, which is designed to assure equal justice to all. [Avery v. State, 174 Ga. App. 116, 119 (329 SE2d 276) (1985)]

The rule of juror exclusion, however, is sufficiently race-neutral that further protection is not required, and the evidence in the present case did not reach a level that would justify disregarding the rule. Other than the lone affidavit, Spencer offered no evidence that racial bias materially affected the jury's decision to convict him and to impose a death sentence. Compare Dobbs v. Zant, supra, 1574-1579 (summarizing evidence presented on McCleskey claim). Moreover, assuming the truth of the affidavit, it shows only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die. The trial court did not err by refusing to consider the affidavit. Compare Tanner v. U. S., 483 U. S. 107 (107 SC 2739, 2751, 97 LE2d 90) (1987) ("District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the non-juror evidence offered by petitioners, that an additional post-verdict evidentiary hearing was unnecessary.")

4. Spencer argues in his fifteenth enumeration that the state offered impermissible "victim-impact" evidence in violation of Booth v. Maryland, 482 U. S. 496 (107 SC 2529, 96 LE2d 440) (1987). The evidence he complains about consists of two photographs of the victim, one taken while he was alive and one showing him deceased. In a murder case, the state has to prove beyond a reasonable doubt that the defendant "cause[d] the death of another human being." OCGA § 16-5-1. The two photographs were relevant to an essential element of the crime of murder. There was no violation of Booth here. Moon v. State, 258 Ga. 748 (16) (375 SE2d 442) (1988). Nor do we find meritorious his 21st enumeration in which he contends the photograph showing the victim after he was killed should have been excluded on grounds of gruesomeness. See Brown v. State, 250 Ga. 862 (302 SE2d 34) (1983).

5. Following a Jackson-Denno hearing, the state introduced evidence of a statement given by the defendant to an investigator explaining how he had obtained and concealed the murder weapon. At the hearing, the investigator testified he spoke to the defendant with the permission of the attorney who was then representing the defendant. (The statement was obtained in 1974.) Based on this unrefuted testimony, the trial court admitted the statement. Now, relying on portions of the original trial transcript not introduced at this retrial, Spencer contends in his 16th and 17th enumerations of error that the statement was taken in violation of his right to counsel.

The statement at issue was, in toto: "A trustee had given [the gun] to [Spencer], and he had dismantled it and hid it over the shower for a number of days prior to being transported." In view of testimony by another inmate that he saw Spencer in possession of the gun at the jail, and the unrefuted testimony that Spencer was in possession of a gun while he was being transported, any possible error in the admission of this statement is harmless beyond a reasonable doubt.

6. We do not find that the state suppressed material evidence, favorable to the defendant, that was known to the prosecution but unknown to the defense. (Enumerations 18 and 20.) Hence, we find no violation of Spencer's rights under Brady v. Maryland, 373 U. S. 83 (83 SC 1194, 10 LE2d 215) (1963). See Parks v. State, 254 Ga. 403 (3) (330 SE2d 686) (1985); Castell v. State, 250 Ga. 776 (2) (301 SE2d 234) (1983).

7. In his 19th enumeration, Spencer complains of the state's use of his prison records to cross-examine Spencer after Spencer testified on direct about his good behavior in prison. There was no objection at trial to this aspect of the state's cross-examination, and this issue is not preserved for review.

8. In his 22nd enumeration, Spencer contends the court erred in a number of its evidentiary rulings. Spencer complains of these rulings: (a) The trial court limited the re-direct examination of the defendant on the ground that it was repetitious of matters already brought out on direct and cross-examination. (b) The trial court allowed a state's witness to

testify over objection that his investigation had uncovered no evidence that Spencer fired a warning shot before firing at either of his victims. (c) The trial court allowed this witness to describe the scene depicted in a photograph while displaying it to the jury. (d) The trial court allowed the state to ask Spencer on cross-examination whether Spencer (who admitted killing the victim) had killed with "malice aforethought." (e) The court allowed a witness to testify that stains shown in a photograph were bloodstains.

The trial court enjoys a wide discretion in determining the admissibility of evidence. Lee v. State, 258 Ga. 762 (6) (374 SE2d 199) (1988); Hicks v. State, 256 Ga. 715 (13) (352 SE2d 262) (1987). Compare U. S. v. Metallo, 908 F2d 795 (11th Cir. 1990). We find no abuse of discretion here.

Spencer also complains of the admission of the handcuff key in evidence. There was no objection to this evidence at trial.

In addition, he complains that a photograph not admitted in evidence was displayed to the jury. There was no objection to this display. Moreover, although, probably through inadvertence, the state did not formally offer this photograph in evidence, it apparently was treated as evidence by all parties. (A copy is included in the transcript at p. 1040, with other photographs admitted in evidence). See Clayton v. State, 149 Ga. App. 374 (1) (254 SE2d 518) (1979).

The identification of the murder weapon was sufficient. Ramey v. State, 238 Ga. 111 (4) (230 SE2d 891) (1976).

Contrary to the defendant's contention, a trial court may allow a witness to read from his notes if the witness had personal knowledge of the matters referred to. OCGA § 24-9-69; Mincey v. State, 257 Ga. 500 (6) (360 SE2d 578) (1987).

Finally, a trial court retains the discretion to allow leading questions on direct examination. OCGA § 24-9-63. There was no abuse of that discretion in this case.

9. In his 23rd, 24th and 28th enumerations of error, Spencer contends the district attorney and the trial court attempted to "orchestrate" a death sentence and were guilty of misconduct. Almost all of Spencer's allegations of prosecutorial misconduct relate to the prosecutor's opening statements, closing arguments, or the evidence of prior crimes, and are complaints raised for the first time after trial. The contemporaneous objection rule cannot be avoided by characterizing trial occurrences as examples of prosecutorial misconduct. In this case, prosecutorial conduct not objected to at trial will not warrant reversal on appeal. See Skipper v. State, 257 Ga. 802 (3) (364 SE2d 835) (1988).

The defendant's allegations concerning the trial judge are not particularly helpful. If the court committed error, or abused its discretion, such matters can better be addressed directly than by filling a single enumeration of error with a "laundry list" of rulings by the court, many of which are addressed elsewhere in the defendant's brief and in this opinion. For example, we have held that the court did not abuse its

discretion in the conduct of the voir dire examination, and have addressed the court's rulings on the qualifications of specific jurors. See Division 1 of this opinion.

Spencer complains the court "pushed the trial to completion by holding court well beyond 5:00 p.m. each day." A trial court retains the discretion to determine how late to hold court before recessing for the evening. Although it is likely that such discretion could be abused, Spencer does not even try to demonstrate any abuse here.

In addition, Spencer contends the court allowed misconduct by state personnel. For example, he contends the court allowed the district attorney's investigator "to indicate his approval or disapproval of the testimony of various witnesses by nodding [or shaking?] his head..." The only reference in the transcript to this is at p. 678, when Spencer's attorney brought the matter to the court's attention at a bench conference. The court replied, "I'll tell him. I've noticed that, too." No further relief was sought by the defendant, and the matter was not raised again. We do not find that the court "allowed" misconduct by state personnel.

We find no merit to these enumerations of error.

10. In his first five enumerations of error, Spencer raises issues about the prosecutor's introduction of Spencer's criminal record of convictions based on guilty pleas.

We remanded this case previously (see fn. 1), noting that these convictions based upon guilty pleas were used in

aggravation of sentence, and directing the superior court, in light of Johnson v. Mississippi, U. S. (108 SC 1981, 100 LE2d 575) (1988), to determine whether Spencer's guilty pleas were knowing, intelligent and voluntary. See Cook v. Zant, 259 Ga. 299 (379 SE2d 780) (1989).[4]

On March 3, 1970, Spencer pled guilty to one count of rape, two counts of assault with intent to rape, two counts of kidnapping, one count of assault with intent to murder and two counts of motor vehicle theft. There is no transcript of the plea colloquy. However, the trial judge who had accepted these pleas in 1970 testified at the hearing on remand. Judge Fleming identified a form he invariably used in 1970 when accepting guilty pleas. The form contained a list of questions to ask the defendant and his attorney. The questions to the defendant probed his educational background, his understanding of the charges against him and of his right to a jury trial, and whether the defendant was entering his plea freely and voluntarily.[5] The

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[4] In Johnson v. Mississippi, supra, the U. S. Supreme Court reversed a death sentence based in part on a conviction set aside in habeas proceedings after the death sentence had been imposed. In Cook v. Zant, we granted habeas relief on a 1950 murder conviction that had been used in aggravation in a 1985 death-penalty case. See Cook v. State, 255 Ga. 565 (340 SE2d 843) (1986).

[5] The questions to be asked the defendant were, verbatim:

1. Are you the named John Doe in the indictment?
2. Do you understand the nature of the charges against you?

Note: At this stage an explanation of the charges might be necessary for the protection of the transcript, and the indictment should be read to the defendant.

attorney would be questioned to determine if he had consulted with the defendant, explained to him his rights, discussed the charges and explained the consequences of a guilty plea, and whether any reason might exist not to accept the plea.[6]

Judge Fleming testified he was confident that he would not have accepted a plea unless satisfied that it was knowing,

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3. Do you understand the English language?
4. How far did you proceed in school?
5. Can you read and write?
6. Have you consulted with counsel?
7. Do you understand that you have a right to plead either "guilty" or "not guilty?"
8. If you plead "not guilty," you will be entitled to a trial before a jury; but in the event you plead "guilty," this court will impose a sentence as provided by law.
9. Do you wish to enter a guilty plea?
10. Do you understand the meaning and the consequences of a guilty plea?
Note: In most cases, if not in all cases, the defendant ought to be informed as to the maximum sentence provided by law.
11. Have you been promised a lesser sentence or easier treatment or threatened into making a guilty plea?
12. Is this plea made of your own will--that is freely and voluntarily?
13. Please give me some of the facts surrounding your case, or your participation in the alleged criminal activity.

[6] The questions to the attorney were:

1. Mr. Attorney, have you had an opportunity to consult with the defendant?
2. Have you explained to him his legal and constitutional rights?
3. Have you discussed the charges against the defendant, and explained to the defendant the consequences of a guilty plea?
4. Mr. Attorney, is there any defense or any defect in either the process or the procedure in this case, or is there any other matter which could or should act to prevent the defendant from entering a plea of guilty or the court from accepting such a plea?

intelligent and voluntary.

On October 31, 1974, Spencer pled guilty to one count of attempted escape. Judge Fleming presided over this guilty-plea proceeding also. Again, there apparently is no transcript of the guilty-plea hearing. However, Judge Fleming testified that in 1974 he relied upon a guilty-plea questionnaire filled out and signed by the defendant with the assistance of counsel, as well as personal questioning of the defendant. The record contains (1) the questionnaire signed by the defendant, (2) a certificate of the defendant's attorney stating that the attorney had investigated the case, reviewed the questionnaire with the defendant and assured himself that he understood the questions, and (3) an order signed by the trial court finding that based on "questioning the defendant and his counsel" and on the "plea, acknowledgment and waiver," the defendant's plea was knowingly, intelligently and voluntarily entered.

(a) Spencer argues it was error to give the state an additional opportunity to present evidence on remand. We disagree. The trial court originally decided the guilty-plea issue on procedural grounds. Remanding the case to give the state an opportunity to present evidence on the merits of this issue did not subject the defendant "to be twice put in jeopardy of life or limb," U. S. Constitution, 5th Amendment. See, Lockhart v. Nelson, 488 U. S. (109 SC 285, 102 LE2d 265) (1988); Hall v. State, 244 Ga. 86 (259 SE2d 41) (1979).

(b) Spencer's guilty pleas were admitted without objection

at trial. They were offered at the guilt phase of trial because Spencer was charged with the offense of escape and it was necessary to prove that he had been convicted of a felony and was in lawful custody. OCGA § 16-10-52 (a) (1). They were relevant at the sentencing phase as general evidence in aggravation, OCGA § 17-10-2, and the conviction for rape was relevant to prove the § b (2) statutory aggravating circumstance. See OCGA § 17-10-30 (b) (1).

Our remand order was not a ruling that the state's procedural objections to raising this issue were not valid. In Pope v. State, 256 Ga. 195, 209 (17) (345 SE2d 831) (1986), we held that "once the defendant raises the issue of knowing and voluntary waiver with respect to prior guilty pleas, the burden is on the state to establish a valid waiver." Since Spencer did not object at trial to the use of his prior convictions, we hold it was not error to admit them without proof by the state that Spencer had knowingly, voluntarily and intelligently entered his pleas of guilty.

However, with the benefit of the evidence presented at the hearing on remand, we now conclude, alternatively, that the state has proven satisfactorily that Spencer's guilty pleas were valid.

(c) We do not find that the prosecutor's cross-examination of the defendant at trial about his guilty pleas "amounted to unsworn testimony" as the defendant contends. Each party is entitled to a thorough and sifting cross-examination. OCGA § 24-9-64. Leading questions are allowed. OCGA § 24-9-63. There was

no abuse of discretion by the trial court. Mullins v. State, 157 Ga. App. 204 (4) (276 SE2d 877) (1981).

(d) The trial court did not err by failing to give a limiting instructing to the jury about the guilty-plea evidence where the defendant did not request such an instruction.

11. In his 25th enumeration of error, Spencer contends he was denied effective assistance of counsel. See Strickland v. Washington, 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984).

Spencer was represented at trial by Benjamin Allen and Sheryl Hudson. Allen contacted the ACLU and several attorneys from Augusta to obtain information and advice about trying death penalty cases. He conferred with John Ruffin, who had represented Spencer at his first trial. Allen and Hudson interviewed all of the state's witnesses who would talk to them, and read the transcript from the first trial. They filed numerous pretrial motions and were granted funds to employ a psychologist to examine the defendant and to employ a sociologist to assist with jury selection.

In light of Spencer's criminal record and the strong evidence of guilt in this case, coupled with his good behavior in prison for the past 10 years, defense counsel decided to take the approach that Spencer had once been wild and uncontrollable but had changed for the better.

Allen testified that he did not investigate the voluntariness of the prior guilty pleas because he had discussed them with Spencer and Spencer had told him the pleas were

voluntary. Moreover, the crimes all pre-dated 1974, and the evidence was consistent with the defense strategy of proving Spencer's improved behavior.

Spencer contends his trial attorneys failed to conduct an adequate cross-examination of some of the state's witnesses. Allen, however, testified that these witnesses were favorable in some respects to the defendant, and he made a strategic decision not to try to discredit their testimony.

Spencer's strongest attack, however, is that his trial attorneys failed to present the testimony of witnesses who, Spencer claims, could have presented important evidence in mitigation at the sentencing phase of the trial.

Allen explained why he did not present the testimony of these witnesses. He testified that he was given a list of potentially mitigating witnesses by the defendant, and he tried to contact all of them. He was unable to contact Julie Lockhorn, who lives in Cincinnati, despite repeated efforts to do so. Allen pleaded with Joanna Gibson to testify on Spencer's behalf, but she stated she did not want to testify on the defendant's behalf. Allen testified: "[M]y position, if you've got a character witness that does not want to come down, leave them alone, because basically she has nothing good to say." Allen contacted Claude McCann, a counselor at the Georgia Diagnostic Center. McCann told Allen that "it was his feeling that Spencer had not changed." Other prison officials Allen contacted told him that Spencer had not changed and they could say nothing

helpful to the defendant.

Spencer's trial attorneys presented mitigating evidence available to them. We find that Spencer has failed to overcome the strong presumption that his trial attorneys effectively represented him. See Cook v. State, 255 Ga. 565 (17) (340 SE2d 843).

12. In his 26th enumeration, Spencer claims the trial court erred by permitting jury deliberations to continue when one of the jurors was ill.

All the transcript shows is that just before closing arguments began at the guilt phase of the trial, the court stated:

> I understand one of the jurors is not feeling too well. We are going to try to get you some whatever you need to help you and get it to you just as soon as we can.

Then, the court interrupted the district attorney's closing argument:

> Mr. Sibley, excuse me just a minute. This man ... one of the men on the jury has a stomach disorder and they sent over and got something he said he could take and help him through this.

Spencer did not object, and the record does not show that this juror was too ill to continue.

13. Next, Spencer argues he should have been granted a continuance to give him time to evaluate his prison records which arrived the first morning of jury selection. Spencer did not ask for a continuance, and has not shown he needed additional time to review these records. There was no error.

14. That the trial court's order denying the defendant's

motion for new trial purported to find the grounds thereof "individually and collectively to be without merit" does not mean this court must address the merits of issues not timely raised at trial. Enumeration 29 is without merit.

15. In enumeration 30, Spencer contends the state refused to provide court-ordered discovery during the proceedings on remand. Spencer sought to review records of his guilty pleas and, as well, records in other cases of guilty pleas taken in Richmond County between 1969 and 1974. Some of the records he sought were in the custody of the Clerk of Court and the Director of the "Richmond County Retention Center." Apparently, pertinent information in the custody of the prosecutor or law enforcement agencies was furnished as requested. Moreover, as the district attorney argued below:

> The defendant's motion [to compel] shows on its face, in paragraph 5, that the clerk produced the requested records and allowed counsel the right of inspection. The fact that the Clerk apparently does not have custody of records sought by the defendant is not inconsistent with the fact that the [defense] has located plea transcripts in [records of] habeas corpus hearings [involving Burke County cases].

The district attorney noted that the Clerk was an independent official not under his direction or control, and suggested that the defendant bring the clerk into court to speak for himself. See, e.g. OCGA § 50-18-73. This the defendant failed to do. The trial court did not err by denying the defendant's "motion to compel." Supp. Record at 249-50.

16. The trial court did not abuse its discretion by refusing to grant a continuance at the sentencing phase of the

trial to await the arrival of a witness who was not under subpoena, whose whereabouts were not known for sure, who had corresponded with the defendant but had only seen him a few times in prison, and whose possible testimony the court was informed about only on the afternoon of the last day of trial. See Wilson v. State, 250 Ga. 630 (8) (300 SE2d 640) (1983); OCGA § 17-8-25.

17. In his 32nd and 33rd enumerations, Spencer complains about the court's instructions on mitigating circumstances. While we do not see any reason to instruct a jury to list on the verdict form the mitigating circumstances it has found, we find no constitutional error. The trial court defined "evidence in mitigation" but cautioned the jury:

> Now, members of the jury, I charge you, you may ... and this is a matter entirely in your discretion, recommend a life sentence for the accused on this charge based upon any mitigating circumstance or reason satisfactory to you or without any reason, if you, the jury, see fit to do so, in this case.
>
> I further charge you that you may sentence the defendant to life imprisonment although you find any or all the previously mentioned alleged aggravating circumstances to be present in the case and even though no mitigating circumstance or circumstances are found to exist in the case.

These instructions were repeated later in the charge. The court's charge did not impermissibly limit the jury's consideration of mitigating evidence. See Romine v. State, 251 Ga. 208 (10 b) (305 SE2d 93) (1983).

18. In his 35th enumeration, Spencer complains about the court's response to a jury question during its sentencing deliberations. However, the defendant agreed at trial with the

court's response, and may not now complain about it.

19. The jury's written finding on the § b (1) circumstance referred to a prior record of "convictions" (plural). Spencer contends that since evidence shows only one capital felony conviction for rape, the evidence is insufficient to support the jury's § b (1) finding. See OCGA § 17-10-30 (b) (1).

The state presented no evidence that Spencer had more than one conviction for rape. Moreover, it was not disputed that he had that one conviction for rape. We note there was no objection to the form of the verdict, Potts v. State, 259 Ga. 96 (22) (376 SE2d 851) (1989), and find that the jury's § b (1) finding is supported by the evidence.

20. While the state may not argue that the defendant might be paroled, OCGA § 17-8-76, the state is permitted to argue that a defendant's probable future behavior "indicates a need for the most effective means of incapacitation, i.e., the death penalty...." Ross v. State, 254 Ga. 22, 34 (7) (326 SE2d 194) (1985). The prosecutor did not err by arguing that, based on his record, Spencer is an escape risk.

21. Out-of-state counsel volunteered to represent the defendant after he was convicted and sentenced to death. A local attorney also represented the defendant for a short time but then withdrew. Spencer claims he withdrew because of pressure from the victim's daughter whom he describes as an elected official in Richmond County, and contends it amounted to state interference with his right to counsel. However, although the court was

willing to hear from the local attorney about why he had withdrawn, Spencer declined to present his testimony. His legal contentions are therefore without factual support.

22. The issue of attorney fees for Spencer's original trial attorneys is not properly before this court. Moon v. State, 258 Ga. 748 (6) (375 SE2d 442) (1988).

23. The court did not err as contended in enumeration 41, by denying Spencer's motion for reconsideration of the denial of his motion for new trial.

24. We do not find that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor. OCGA § 17-10-35 (c) (1).

25. The jury found three statutory aggravating circumstances: § b (1), § b (9) and § b (10). The evidence supports these findings beyond a reasonable doubt. OCGA § 17-10-35 (c) (2).

26. The sentence of death is neither excessive nor disproportionate, considering both the crime and the defendant. OCGA § 17-10-35 (c) (3). The similar cases listed in the Appendix support the imposition of a death sentence in this case.

Judgment affirmed. All the Justices concur.

APPENDIX.

Kinsman v. State, 259 Ga. 89 (376 SE2d 845) (1989); Morrison v. State, 258 Ga. 683 (373 SE2d 506) (1988); Cook v. State, 255 Ga. 565 (340 SE2d 843) (1986); Walker v. State, 254 Ga. 149 (327 SE2d 475) (1985); Mincey v. State, 251 Ga. 255 (304 SE2d 882) (1983); Stevens v. State, 247 Ga. 698 (278 SE2d 398) (1981); Tucker v. State, 245 Ga. 68 (263 SE2d 109) (1980); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); Davis v. State, 241 Ga. 376 (247 SE2d 45) (1978); Stephens v. State, 237 Ga. 259 (227 SE2d 261) (1976).

SUPREME COURT OF GEORGIA

ATLANTA DECEMBER 19, 1990

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. S90P0921

JAMES LEE SPENCER V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

IN THE SUPERIOR COURT OF

BURKE COUNTY, GEORGIA

STATE OF GEORGIA	)	INDICTMENT NO. 87-R-65
	)	
VS	)	APRIL TERM, 1987
	)	
JAMES LEE SPENCER	)	ORDER

On September 22, 1988, the defendant's Fourth Amended Motion for New Trial came on before me for hearing in the Burke County Superior Court. At that hearing the Court heard the testimony of Mr. Benjamin Allen, the attorney who was the defendant's principal counsel at trial. Mr. Allen's testimony dealt with the issue of his competency as trial counsel and the Court listened to it carefully and has given it great consideration. The Court notes that ground 57 of the defendant's motion makes numerous allegations of ineffective assistance of counsel.

After having heard Mr. Allen's testimony, this Court concludes that the quality of Mr. Allen's representation did not fall below an objective standard of reasonableness. See Williams v. State, 258 Ga. 281, 286(7), 368 S.E. 2d 742 (1988). Most, if not all, of the defendant's allegations of ineffective assistance were thoroughly and completely explained by Mr. Allen as being matters of trial strategy. The reasonable choices that an attorney makes with regard to trial strategy are not matters that constitute ineffective assistance such as will mandate a new trial. McDuffie v. Jones, 248 Ga. 544, 550(4), 283 S.E. 2d 601 (1981). In any event, the defendant suffered no prejudice on account of defense counsel's

alleged errors and omissions when they are considered in the light of the strength of the State's case and the ample evidence supporting the aggravating circumstances which authorized the imposition of the death penalty. Reese v. State, 257 Ga. 624, 361 S.E. 2d 796 (1987).

This Court finds that Mr. Allen represented the defendant in a constitutionally adequate, effective and indeed exemplary manner.

The Court has further examined all of the other grounds set forth in the defendant's motion and it finds them individually and collectively to be without merit.

Accordingly, the defendant's Fourth Amended Motion for a New Trial is DENIED as to each and every ground thereof.

SO ORDERED, this 3rd day of October, 1988.

FRANKLIN H. PIERCE
J.S.C.A.J.C.

Presented by:

CHARLES R. SHEPPARD
Assistant District Attorney
Augusta Judicial Circuit

401 Walton Way, Suite 2121
Augusta, Georgia 30911

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date served a copy of the within and foregoing ORDER upon Mr. JOHN (JACK) PAUL BATSON, Attorney at Law, 303 Telfair Street, Augusta, Georgia 30901, counsel for the defendant, James Lee Spencer, by depositing same in the United States Mail with sufficient postage attached thereon.

This 3 day of October, 1988.

CHARLES R. SHEPPARD
ASSISTANT DISTRICT ATTORNEY
AUGUSTA JUDICIAL CIRCUIT

SAM B. SIBLEY, JR.
DISTRICT ATTORNEY
JOINT LAW ENFORCEMENT CENTER
401 WALTON WAY - Room 2121
AUGUSTA,, GA. 30911-2121
(404) 821-1135

/CRS

AFFIDAVIT

STATE OF GEORGIA)
: ss.:
COUNTY OF BURKE)

ELLA PEARL MOORE, being duly sworn, deposes and says:

1. I was a member of the jury which convicted and sentenced to death defendant James Lee Spencer on September 3, 1987. I have lived in Burke County all of my life.

2. I know that race and racial bias was a significant factor that some of the jurors used in reaching their decision in this case.

3. During jury deliberations in the guilt/innocence phase, a white female juror made racially derogatory statements in the jury room, including the statement, referring to the defendant, that "A nigger deserves to be dead." That juror was in her 20's, stout and a resident of Waynesboro, Georgia. I believe she was employed as a secretary. I do not know her name.

4. Another white juror, Charles McLeroy, also made similar racially derogatory comments about the defendant during jury deliberations. I have personally known Mr. McLeroy for many years and believe him to be racially prejudiced.

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5. Based on those juror statements and my observations as a juror in the jury room, I know that defendant's race was an important factor in certain juror's decisions to convict defendant and sentence him to death.

Ella Pearl Moore

Sworn to before me this
day of June, 1988.

Notary Public

6-9-88

Ella P. Moore

Sworn to before me this
9th day of June, 1988

Notary Public

IN THE SUPERIOR COURT OF BURKE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA, :

- against - : Indictment No. 87-R-65

JAMES LEE SPENCER, : April Term, 1987

Defendant. :

County of Multnomah)
: ss.:
State of Oregon)

LEAH KIRTLAND, being duly sworn, deposes and says:

1. I am submitting this affidavit to describe in detail the unique relationship our family has had with James Lee Spencer for the last ten years. I have a son who is a sophmore at the University of Oregon and a daughter who is a sophmore in high school. My children, my ex-husband and myself have corresponded with and have visited with James for the past decade and throughout those years, we have grown to love James very much and consider him to be a part of our family.

2. My family and I began corresponding with James in September of 1978. Since that time, we have written to him on an average of twice a week. In addition, we have been in contact by telephone with James at least every other month for approximately seven years. Through that ongoing relationship, we have come to know James in a special way and I believe have developed a very personal and individualized relationship with him.

3. During the first four years we wrote and spoke with James, we were not allowed to be on his visitation list at the prison, as we were not immediate family members. During that time, however, we learned to know about his life and his faith, and we took an active interest in his life in prison.

4. For example, in the fall of 1979, about a year and one-half after James was transferred from the Georgia State Penitentiary to the Georgia Diagnostic and Classification Center in Jackson, he was subjected to numerous threats by other inmates and at least three attempts on his life were made. Out of our concern for his welfare, we wrote to Mr. William Lowe, at the Department of Offender Rehabilitation to express our concern for his safety and to request that James be moved back to the Georgia State Penitentiary or to some other facility. See letter from Richard and Leah Kirtland to Mr. William Lowe, dated October 6, 1979. After James was attacked by another inmate, we wrote to United States District Judge Wilbur Owens again requesting that he intercede on James' behalf. See letter from Dick and Leah Kirtland to Honorable Judge Wilbur Owens, dated October 24, 1979. Although those efforts were not successful, it taught us to understand the dangerous and frustrating circumstances under which James was living and helped us appreciate how difficult the rehabilitative process is in that environment.

5. After repeated efforts, we were finally granted visitation rights, and I went to see James for the first time in December of 1983. James surprised me. He was not the angry, hostile, young man I expected to meet at all. Instead, he radiated a sense of caring, and compassion and peace.

6. That first time that I visited James was a difficult time in my life. Although I went to the prison in an effort to do something good for James, I honestly felt that he did something for me by giving me a new strength that helped me get through that period. I honestly walked away from that December 1983 visit feeling ashamed for myself that a person in his situation could work so hard to help me.

7. It was during that first visit that I began to appreciate James' development over the years that I had known him and the real commitment to God and his faith he had made while he was in prison. Several attempts had been made on his life while he was in the penitentiary. The first time I visited him, however, I witnessed the true meaning of forgiveness. One of the men that had injured him physically was with us in a very small visiting area. James introduced us and told me that he had gone to the man and assured him that he had forgiven him and held no grudge or any hard feelings. James has demonstrated that type of attitude over and over again throughout the years. In him I see no anger or hostility, only sincere sorrow for any pain or suffering he has caused others.

8. Another example of James' maturity is how he has dealt with the adversity in prison. For example, twice while James and I visited over the last couple of years, we were verbally confronted with what seemed to me to be racial remarks made by personnel at the Diagnostic Center. The last incident occurred when my daughter visited James with me in December of 1987. I am not used to that kind of verbal abuse and I was simply furious that it was directed to James and to us. James' only reaction, however, was an apology to us for having to take the brunt of someone else's ignorance. That incident only reconfirmed the many other times that he has refused to not respond in a negative way to the adverse conditions of prison life. He continues to survive in that "trying" environment and always maintains a positive attitude.

9. As I said above, James' relationship with our family has been very unique. He has never, in all the years we have known him, forgotten us on our birthdays, anniversaries or holidays with a card (oftentimes handmade) and/or handmade gifts. James has never asked for, nor does he expect, anything in return. He "gives" because he truly cares.

10. That special concern for family applies to his own child as well. Although James has been separated from his daughter for many years, he has always remembered her with a card at Christmas, her birthday, and other special holidays. I know it has been a long time since James has seen her. He has loved her from

a distance in order to spare her anymore pain or sorrow. His daughter is now twenty years old, in college, and when James speaks of her, the loss he has suffered is very evident by the tears in his eyes.

11. James is extremely intelligent and I believe he would definitely be an asset to our society. His ministry in life is to help others in every way possible to live good, productive, Christian lives and not to make the same mistakes he has made. He truly cares about people. I believe putting this man to death would indeed be a waste of a fine young man who has so much to offer.

12. Our family have anxiously followed with James, the course of his legal proceedings over the last ten years. When his new trial was scheduled in September, I was more than pleased to offer my assistance in any way possible and to come and testify in his behalf. I feel strongly that our family's long term relationship with James, from a perspective far away from any other people he knew in Georgia, would offer the jury a very different point of view of the man before them. Our long term correspondence with James, and our opportunity to see the changes in him over time, would help the jury understand that this is a very different individual from the young, angry man who was involved with the incidents in 1974.

Exhibit A

13. As I had discussed with Ben Allen, James' trial counsel, I flew from Oregon to Augusta, Georgia on September 3, 1987, so that I could appear as a live witness to this trial. Mr. Allen had expected the trial to last through September 4th. My plane was on time and Mr. Allen's brother-in-law picked me up at the airport and drove me down to Waynesboro to the courthouse.

14. When I arrived, Mr. Allen was making his closing argument to the jury in the sentencing phase. Although I was ready and willing to testify, neither the Court nor Mr. Allen sought to stop the District Attorney's closing argument so that I could get on the stand. Because I could have provided testimony about James which was different than the testimony provided by Mr. Spencer's mother or by Chaplain Leavelle, I do not think the jury was presented with the full story about the kind of person James has become since 1975.

Leah Kirtland
Leah Kirtland

Sworn to before me this
23rd day of August, 1988.

Debra K A Jonsen
Notary Public

My commission expires 02/14/89

October 6, 1979

Mr. William Lowe
Dept. Of Offender Rehabilitation
Room 821, 800 Peach Tree St.
Atlanta, GA 30308

Dear Mr. Lowe,

We are writing to express our deep concern for the safety of an inmate at the Georgia Diagnostic & Classification Center in Jackson & request that he be moved to the Grorgia State Penitentiary or some other facility. There have been at least three attempts on his life and numerous threats. Some time ago he spent 28 days in solitary confinement during which time he lost 40 lbs. Now, we find that unbelievably cruel & quite disgusting. His name is James Lee Spencer, #-76271. Though we're not blood relatives, James is very dear to us & we look upon him as very much a part of our own family.

We have requested permission to visit him & have been denied because we are not his immediate family. We were put on his Receipt Of Fund List but cannot understand why we're not permitted to visit him. Also, in 11 months time, he has only been allowed to telephone us twice. And, that was only after we'd written to Mr. Bishop a number of times.

We have written our attorney asking for assistance also. We'd appreciate your consideration in this matter at your earliest convenience.

Sincerely,

Captain Richard & Leah Kirtland

Richard & Leah Kirtland
Pt. T, Box 3732
Warren, GA 30828

October 24, 1979

Honorable Judge Wilbur Owens
U. S. District Judge
Middle District of Georgia
Macon, Georgia 31202

Dear Judge Owens,

We are writing to express our deep concern for the safety of a man at the Georgia Diagnostic & Classification Center in Jackson and ask for your assistance. His name is James Lee Spencer, A-76271. Three or more attempts have been made on his life in the past few months and the most recent one being only about a week ago. He is presently in isolation due to this incident in which he was forced to defend himself. Another time he had scalding water thrown on him as he lay sleeping. He's also been attacked recently by another inmate with a knife but managed to disarm him without anyone being injured. This happened while the authorities observed and only after the man had been relieved of his weapon did they step in. He also spent twenty-eight days in solitary confinement about six months ago and during that stay lost forty (40) pounds. Now that is unbelievably cruel.

James is very dear to us and we love him as a part of our own family. We've requested permission to visit him a number of times and have been denied because we are not his immediate family. He has very little family even able to visit. One great aunt that he refers to as his mom and that's all. We've also asked and asked and asked for him to be allowed to telephone us and after almost one year he's been able to call twice. We cannot believe the inhumane treatment he's being subject to.

This young man is trying desperately to preserve his life but in the present situation the outlook sure isn't good. We have contacted an attorney and also written to Mr. William Lowe in Atlanta to request that James be moved to another facility.

You know, it looks like nobody will even listen to our plea let alone care enough to take some action. The whole thing is so disgusting. We're certain that place puts Hell to shame. We are really at a loss as to which way to turn for help in this matter. We do appreciate any assistance you can give us and we thank you very much.

Sincerely yours,

Dick & Leah Kirtland

Dick & Leah Kirtland

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Relevant Amendments

United States Constitution

AMENDMENT VIII -- EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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AMENDMENT XIV -- CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken on oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Relevant Statutory Provisions

Official Code of Georgia

16-5-1. Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.

(d) A person convicted of the offense of murder shall be punished by death or by imprisonment for life. (Laws 1833, Cobb's 1851 Digest, p. 783; Code 1863, § 4217; Code 1868, § 4254; Code 1873, § 4320; Code 1882, § 4320; Penal Code 1895, § 60; Penal Code 1910, § 60; Code 1933, § 26-1002; Code 1933, § 26-1101, enacted by Ga. L. 1968, p. 1249, § 1.)

16-5-2. Voluntary manslaughter.

(a) A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder.

(b) A person who commits the offense of voluntary manslaughter, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 20 years. (Laws 1833, Cobb's 1851 Digest, pp. 783, 784; Ga. L. 1858, p. 99, § 1; Code 1863, §§ 4222, 4223; Code 1868, §§ 4259, 4260; Code 1873, §§ 4325, 4326; Code 1882, §§ 4325, 4326; Penal Code 1895, §§ 65, 66; Penal Code 1910, §§ 65, 66; Code 1933, §§ 26-1007, 26-1008; Code 1933, § 26-1102, enacted by Ga. L. 1968, p. 1249, § 1.)

17-9-41. Use of affidavits of jurors relating to verdict.

The affidavits of jurors may be taken to sustain but not to impeach their verdict. (Civil Code 1895, § 5338; Civil Code 1910, § 5933; Code 1933, § 110-109.)

Relevant Rules

Uniform Superior Court Rules

34.2 Statement of Purposes.

(A) Purposes of Outline of Proceedings.

(1) One purpose of the Outline of Proceedings is to establish a procedure to be utilized by the court, defense counsel and the prosecuting attorney prior to, during and after trial to make certain that all matters which possibly could be raised on behalf of the defendant have been considered by the defendant and his attorney and either asserted in a timely and correct manner or knowingly, voluntarily and intelligently waived.

(2) Another purpose of the Outline of Proceedings is to prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may occur.

(3) Another purpose of the Outline of Proceedings is to cause the record or transcripts of proceedings to show that possible issues listed on the Checklist are not involved in the case because those principles of law are not applicable to the facts of the case.

(4) If the defendant later is convicted and if the sentence of death is imposed, these procedures will help to assure that the record and transcripts of proceedings will be complete for unified review by the sentencing court and by the Supreme Court of all challenges to the judgment of conviction and to the sentence of death that may be adjudicated on the basis of the record and transcripts.

(B) Purposes of the Checklist.

(1) One purpose of the Checklist is to remind the court, defense counsel and the prosecuting attorney about general and specific categories of error which ought to be avoided in the prosecution of a case in which the death penalty is sought. Some of these errors traditionally or necessarily occur at particular stages of the case. Others conceivably could occur during various stages of the case. The Checklist presently does not include every error which

may occur. Defense counsel may raise any issue whether or not it is listed on the Checklist. The Checklist will be amended periodically to add other grounds of error. All members of the bench and bar are encouraged to make suggestions to this court regarding the inclusion of other grounds of error to the end that the Checklist will become more comprehensive of all errors which should be avoided.

(2) Proper use of the Checklist as a means of avoiding or promptly correcting error will require the court to schedule conferences (see Rules 34.3 and 34.4) during which defense counsel and the prosecuting attorney will be given an opportunity to present, or to schedule for presentation, issues which would be waived if not asserted in the proper and timely fashion. The court shall determine during such conferences whether defense counsel intends to allow the deadline for the raising of any issue on the Checklist to pass without first having properly presented the issue for decision. In the event defense counsel intends to allow a deadline to pass without first presenting an issue for decision, the court shall question defense counsel in the presence of the defendant to determine whether or not defense counsel has explained to the defendant his rights regarding that issue and whether defense counsel and the defendant have agreed not to assert the issue. There questions put to defense counsel by the court and the responses of defense counsel shall be taken down and transcribed by the official court reporter to the end that it will be established that the right of the defendant is being waived knowingly, voluntarily and intelligently after due consideration by the defendant and defense counsel.

The court also shall utilize the Checklist to determine that issues are not involved in the case. For instance, the court may cause the record to show that no issue as to arrest without a warrant is involved in the case because the defendant was arrested pursuant to a warrant. Stipulations of defense counsel and the prosecuting attorney as to such recitals of fact shall be in writing on the record or clearly articulated to the reporter, recorded, transcribed and included in the transcripts of proceedings.

34.5 Review Proceedings.

. . .

(A)11. The hearing on the motion for new trial shall not be limited to the grounds of motion asserted by the defendant. Rather, the trial court shall confer with the prosecuting attorney and defense counsel to make sure that the record or transcript of proceedings adequately reflects: (1) all issues presented by the defendant for adjudication by the court and the action of the court thereon, (2) all issues waived by the defendant by knowingly, voluntarily and intelligently allowing a deadline for issue presentation to pass without having presented the issue in a timely and proper fashion, and (3) all possible issues listed on the checklist that are not involved in the case because the principles of law are not applicable to the facts of the case. The checklist will assist the trial court and counsel in this effort to make sure that the record and transcript of proceedings accurately and completely reflect the issues that were presented and adjudicated, and the potential issues that either were not applicable under the facts of the case or were knowingly, voluntarily and intelligently waived by the defendant after ample time was given to consider the defendant's legal position.

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

NO. 90-7435

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

(9)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

MICHAEL J. BOWERS
Attorney General

SUSAN V. BOLEYN
Senior Assistant
Attorney General

PAULA K. SMITH
Assistant
Attorney General

Please serve:

PAULA K. SMITH
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3351

46 pp

QUESTIONS PRESENTED

I.

Should this Court grant certiorari to consider whether Georgia's long-standing rule barring impeachment of verdicts by jurors should be overturned to allow Petitioner to delve into jurors' mental processes?

II.

Should this Court grant certiorari to consider a procedurally defaulted Batson v. Kentucky, 476 U.S. 79 (1986), claim when (a) trial counsel did not specifically raise a challenge at trial; (b) the claim was first raised by new counsel for Petitioner nine months later in the second amended motion for new trial; and (c) this case was tried after the announcement of the timeliness rule of State v. Sparks, 257 Ga. 97, 355 S.E.2d 658 (1987)?

III.

Should this Court grant certiorari to consider Petitioner's meritless contention that the Georgia courts allegedly reinterpreted state law to conclude a voluntary manslaughter instruction was not required under the facts of this case when this rule is well-settled in Georgia and consistent with this Court's decision in Hopper v. Evans, 456 U.S. 605 (1982)?

IV.

Should this Court grant certiorari to consider the question of whether Petitioner was allegedly precluded from presenting mitigating evidence in the form of testimony of an out of state witness where the federal question was not reached below and the facts showed that the whereabouts of this witness were not known, this witness was not under subpoena and counsel could give no assurances of when this witness would arrive in Georgia to testify at trial?

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TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

NO. 90-7435

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, James Lee Spencer, was originally indicted by the Burke County grand jury in 1974 for murder, aggravated assault and escape. Upon a trial by jury, Petitioner was found guilty on all counts and sentenced to death for murder and to ten years each on the aggravated assault and escape convictions, to run concurrently with each other. His convictions and sentences were affirmed on direct appeal. Spencer v. State, 236 Ga. 697, 224 S.E.2d 910 (1976), cert. denied, 429 U.S. 932, 97 S.Ct. 339 (1976).

In 1977, Appellant filed a petition for state habeas corpus relief. Following an evidentiary hearing, relief was denied. The Georgia Supreme Court affirmed the denial of relief. Spencer v. Hopper, 243 Ga. 532, 255 S.E.2d 1 (1979), cert. denied, 444 U.S. 885, 100 S.Ct. 178 (1979).

Petitioner then filed an application for federal habeas corpus relief. Relief was denied by the district court, but the en banc circuit court ultimately remanded the case for an evidentiary hearing on Petitioner's claims regarding challenges to the composition of the grand and traverse juries. Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986) (en banc). Following an evidentiary hearing in the district court on the jury composition issues, the district court granted relief as to Petitioner's convictions and sentences. Spencer v. Kemp, No. CV-179-247 (S.D. Ga. March 31, 1987).

On April 29, 1987, Petitioner was reindicted by the Burke County grand jury for aggravated assault, malice murder, and escape. (R. 1). The case was tried under the Unified Appeal Procedure. At a jury trial beginning August 31, 1987, the jury found Petitioner guilty on all three counts on September 3, 1987. (R. 98). The jury found the existence of three statutory aggravating circumstances: "the offense of murder was committed by said defendant with a prior record of convictions for the capital felony of rape," O.C.G.A. § 17-10-30(b)(1); "the offense of murder was committed by said

defendant while in the lawful custody of a police officer," O.C.G.A. § 17-10-30(b)(9); and "the offense of murder was committed by said defendant for the purpose of avoiding custody in a place of lawful confinement," O.C.G.A. § 17-10-30(b)(10). (R. 104). On September 3, 1987, the jury sentenced Petitioner to death for murder. (R. 106). The trial court sentenced Petitioner to ten years for aggravated assault and ten years for escape, to run consecutively to each other and consecutively to the murder sentence. (T. 1034).

The motion for new trial was filed September 27, 1987, and amended by trial counsel on January 5, 1988. (R. 112; 136). Trial counsel subsequently withdrew. (R. 121). New counsel entered the case on March 3, 1988, and amended the motion for new trial three times. (R. 190; 229; 707). The amended motion for new trial was denied October 4, 1988. (R. 890). The motion to reconsider the denial of the amended new trial motion was denied October 19, 1988. (R. 982). A timely notice of appeal was filed and the case was appealed to the Georgia Supreme Court.

After briefs were submitted on behalf of the respective parties, oral argument was had before the Court on February 13, 1989. On May 25, 1989, the Court remanded this case to the Superior Court "for a hearing to determine whether the appellant's guilty pleas were knowing, intelligent and voluntary." The remand order provided that after a hearing and findings were entered by the trial court, the appeal would be

docketed "anew" in the Georgia Supreme Court.

Pursuant to the remand order, a hearing was held in the trial court on January 16, 1990. On March 28, 1990, the trial court found that the state established that Petitioner's 1970 and 1974 guilty pleas were constitutionally valid.

The case was then rappelaed, rebriefed and reargued in the Georgia Supreme Court. On November 21, 1990, that court affirmed Petitioner's convictions and sentences. Spencer v. State, 260 Ga. 640, 398 S.E.2d 179 (1990). Rehearing was denied December 19, 1990.

The instant petition seeks review of the direct appeal decision. A review of the facts as established at trial is now set forth to assist the court in determining whether certiorari should be granted.

Burke County resident Robert Hickman, and his brother, were at Morris Grocery between 10:10 and 10:15 a.m. on October 31, 1974. (T. 675-77). The store was located at the forks for Highways 24 and 25. (T. 676). Highway 25 linked Waynesboro to Reidsville. Id. A person came into the store and asked them to call for an ambulance because someone allegedly had been run over. (T. 677). Hickman and his brother left while the store manager called for help. Id. One hundred yards from the store Hickman saw an elderly man standing at the trunk of a car while another man lay on the right shoulder of the road, bleeding. (T. 678-79). The elderly gentleman standing at the rear of the

car told Hickman not to come closer because the person sitting in the car had shot the man who was lying on the roadside. Id. The wounded man, who was too bloody for Hickman to distinguish any facial features, appeared to be trying to get up. (T. 680). The man inside the car, whose hands were free, asked Hickman to help him and to let him out. (T. 680-81). Hickman then realized the car had a cage between the front and back seats, so Hickman left to retrieve his gun from his truck. (T. 681-82). While Hickman was at his truck retrieving his weapon, he heard some shots in rapid fire. (T. 684). When Hickman returned, Trooper Parker was handcuffing Appellant. Id. The elderly gentleman, Lett Williams, was lying on the ground by the right front door of the car. (T. 684). The trooper and Hickman gave mouth to mouth resuscitation to Mr. Williams. (T. 685). Hickman then rode in the ambulance with Mr. Williams, who had sustained a head wound. Id. Hickman had also seen Petitioner, who was the man in the car, with a small caliber, blue automatic pistol which resembled State's Exhibit No. 1. (T. 685).

Dr. James Jackson, an orthopedic surgeon in Augusta, Georgia, and his wife were traveling through Waynesboro on the same morning. (T. 700, 706). They came upon a car parked in the middle of the road with two men outside the car, one lying on the roadside. (T. 701-702). The doctor

stopped his vehicle because he could not get by. Id. The doctor then saw a man in the back seat of the car and from seeing the cage realized it was a police car. (T. 702). The man was sitting sideways on the backseat, his right arm in the back window, kicking the right rear door with his foot. (T. 702-703). The man, who the doctor later learned was Petitioner, held a small caliber pistol in his right hand. (T. 703). The doctor saw that the man lying on the roadside, Deputy Hunter Beazley, was injured; Beazley said he had been shot and that Petitioner was trying to kill him. (T. 703). A "copious" amount of blood was on the right side of the deputy's face. Id. Lett Williams, who was crouched behind the police car, told the doctor to watch out because the man in the car had a gun. (T. 704). The doctor got back in his car, backed it up 100 yards to a store, and went in to call the police. (T. 704). The doctor told a man in the store, who was there in a truck and who had a gun, to call police and then bring the gun. Id. At that point the doctor looked back and saw that a patrolman had arrived from the opposite direction and stopped. Lett Williams was lying on the ground beside the police car, and a black male was running across the side of the road towards the woods. (T. 704). The patrolman fired several shots, and the black male fell to the ground. Id. The black male wore a

tee shirt and blue jeans. (T. 705). Upon the doctor's return to the stopped vehicle, the doctor saw that Lett Williams was lying on the ground and had turned blue, indicating he was probably dead. (T. 705). The doctor and his wife took Deputy Beazley to the Burke County Hospital which was a half a mile away. (T. 706). The doctor saw that one of Beazley's eyes was severely damaged, and the doctor thought the bullet had actually penetrated the eye. (T. 706). Beazley expressed his concern about his eye, the fact that he had no vision in one eye, and the fact that the man inside the car had not gotten Beazley's gun. Id.

Burke County resident Leslie Padgett was also traveling on Highway 25 that same morning and stopped his car when he noticed a car stopped in the road. (T. 710-11). One man was lying on the ground on the right side of the car, an elderly man stood at the back of the car, and someone was inside the stopped car. (T. 711). As Padgett got out of his car, he noticed that the stopped car was rocking as if someone were fighting inside. (T. 711). Padgett noticed that the man lying on the ground was "real bloody." As Padgett reached in to get his weapon from his car, Padgett saw the elderly gentleman go from behind the car to the passenger side of the stopped vehicle, lean over into the car, and "saw him get

shot" by the man inside the car. (T. 712). "When Mr. Williams stuck his head in the car, the guy that was in the backseat just put the pistol up to his head and pulled the trigger, shot him point blank." (T. 713). At this point a trooper pulled up beside the stopped vehicle. (T. 714). The passenger, who Padgett later learned was Petitioner, jumped out of the rear right window of the car, which had either been shot or kicked out. (T. 714). The trooper began firing at Petitioner, and Petitioner fell to the ground. (T. 714). Petitioner had chains around his waist but his hands were free. (T. 714-15). Padgett identified State's Exhibit No. 1 as a gun resembling the gun the trooper had recovered from Petitioner. Id.

Trooper Charles Parker was on Highway 29 en route to the sheriff's office, came over a rise and saw a cream over bronze Pontiac, headed south, headlights on, stopped in the road with the left front tire across the center line and the right passenger door open. (T. 719-23). The trooper saw a large man in a white shirt get up from the right shoulder of the road and run from the stopped vehicle. (T. 724). The back of the man's shirt, his head and arms were red. Id. The trooper then saw a black male inside the car moving around rapidly, lying down, and kicking the right rear passenger door. (T. 724). The

black male sat up and the trooper realized that the man was in the backseat behind the cage. (T. 724-25). The man in the car then fired a shot through the right rear window, shattering some glass. (T. 725). The man jumped out of the window feet first and ran down the shoulder of the road, towards the trooper. (T. 725). Trooper Parker got out of his car, drew his revolver and fired three quick shots. (T. 725). The man crouched down, turned and saw the trooper. Id. The man then turned and began running toward the woods. Id. The trooper fired another shot, and the man tumbled into a ditch. Id. The trooper overtook him, after picking up a small, dark automatic pistol. (T. 725). The man, who the trooper identified as Petitioner, was then handcuffed by the trooper. (T. 725, 727). Petitioner had on belly chains but had no handcuffs on his wrists. (T. 727). The trooper identified State's Exhibit No. 1 as the weapon he recovered from Petitioner and as the weapon he had seen in Petitioner's hand while Petitioner was in the car. (T. 727).

Trooper Parker and Leslie Padgett, who assisted the trooper in subduing Petitioner, stripped Appellant of his pants and searched him to make sure Petitioner had no other weapon. (T. 729). The trooper then placed Petitioner in the patrol car, making Petitioner sit on his pants because Petitioner had a slight wound to his left

buttock. The trooper noticed that Petitioner had one tennis shoe lace tied loosely around his right ankle. (T. 730). The trooper left Leslie Padgett to watch Petitioner while the trooper went over to the Pontiac to check on the man lying on the ground, face up, who subsequently was identified as Lett Williams. (T. 730-31). The trooper administered mouth to mouth resuscitation and CPR to Mr. Williams until the ambulance arrived, but the trooper thought Mr. Williams was already dead. (T. 730-31). The trooper subsequently checked the unmarked police car for additional weapons and found a holstered handgun, probably a .357 magnum, on the dashboard. (T. 732-33).

Deputy sheriff Hunter Beazley was transporting Petitioner from the Richmond County jail to the prison in Reidsville. (T. 821-25). His father-in-law, Lett Williams, was riding with him for company and to visit a friend in Reidsville while the deputy delivered Appellant to the prison. (T. 824-25). A message came over the police radio that Appellant was armed. (T. 828-30).

Fellow jail inmate Thomas Yancey had told deputy J. B. Dykes, after Appellant left the jail, that Petitioner had a gun. (T. 635, 639; 661, 661-63). Petitioner apparently also had a handmade handcuff key, which he had also shown to Yancey before Petitioner left the jail. (T. 664).

Without any warning and after the radio transmission, Petitioner began shooting and shot deputy Beazley in the back. (T. 829). The deputy snatched the steering wheel back and forth in an effort to keep Petitioner off balance, but Petitioner kept shooting. (T. 829-30). The deputy was shot five times, four times in the back of the head and the fifth bullet going through his left eye. (T. 829-31). At this point the deputy stopped the car and simply placed his head in his father-in-law's lap. Id. The deputy eventually opened the door because Mr. Williams was not familiar with the door latches. Id. The deputy pushed Mr. Williams out and away from the car, and the deputy crawled out. Id. Petitioner had the gun on Mr. Williams, telling him to open the door, and the deputy prevented his father-in-law from doing so. (T. 831). The deputy remembered telling his father-in-law to go for help but Mr. Williams stayed. (T. 831). Deputy Beazley remembered telling Mrs. Jackson who he was, that he was transporting a prisoner, and that the prisoner had a gun and had shot both deputy Williams and his father-in-law. (T. 831-32). The Jacksons then took him to the hospital. (T. 832).

Petitioner was subsequently taken to University Hospital and x-rayed to locate a handcuff key officers believed he had on him. (T. 635-37). The x-ray showed

that the key was in a space between Petitioner's teeth. (T. 652). Petitioner then spit out the key. (T. 653). Deputy Dykes checked the homemade key, and it did unlock handcuffs. Id.

The gun recovered from Petitioner was a .25 caliber, 7 bullet capacity Titan semi-automatic pistol. (T. 726; 770). Investigator Larry Hendrix recovered two empty shell casings from the backseat of the unmarked police car; three empty shell casings on the left rear floorboard; and two empty shell casings from the right rear floor board for a total of seven empty casings. (T. 769). The investigator also recovered a portion of a .25 semi-automatic bullet from the right front floor board of the car. (T. 769-70). One bullet hit the deputy and hit the top of the car, as evidenced by the bullet hole in the headliner which had hair and flesh around it. (T. 772).

Petitioner testified at the guilt-innocence phase and admitted shooting deputy Beazley and Mr. Williams. (T. 836, 846). Petitioner contended he did not have the intent to kill, claiming he was frightened and panicked after he heard the radio transmission. (T. 846-47). He also contended he did not want to shoot Mr. Williams. (T. 847). However, Mr. Padgett had clearly seen Petitioner shoot Mr. Williams "point blank." (T. 713).

The jury found Petitioner guilty of malice murder, aggravated assault and escape. (T. 940).

At the sentencing phase, the state presented no additional evidence in aggravation. (T. 946). Petitioner presented the testimony of a clinical chaplain from the Georgia Diagnostic and Classification Center (T. 953) and of his mother. (T. 964).

The jury found the existence of three statutory aggravating circumstances and sentenced Petitioner to death for malice murder. (T. 1028). The trial court sentenced Petitioner to ten years on each of the other two counts, to run consecutively to each other and consecutively to the murder conviction. (T. 1034).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO OVERTURN GEORGIA'S LONG STANDING RULE BARRING JURORS FROM IMPEACHING THEIR VERDICTS TO PERMIT THE POST-VERDICT INQUIRY INTO JUROR'S MENTAL PROCESSES.

Petitioner initially urges this Court to grant certiorari to consider whether Georgia's long-standing rule barring post-verdict inquiry into the mental processes of jurors, should be overturned to allow Petitioner to inquire into whether racial prejudice may have tainted his death sentence, a sentence based upon the unanimous finding, by an evenly racially-split jury, of three statutory aggravating circumstances. The thrust of Petitioner's argument is based upon language in McCleskey v. Kemp, 481 U.S. 279, 292 (1987), noting that in order to establish an equal protection violation, "McCleskey must prove that the decision makers in his case acted with discrminatory purpose." The Georgia Supreme Court refused to consider Petitioner's affidavit of one juror who asserted that two other jurors allegedly during deliberations made racial remarks. Respondent submits that an

examination of this long-standing rule and the policies behind it shows that the Georgia Supreme Court did not arbitrarily rely upon it to avoid reaching a federal constitutional question. Respondent further submits that the court properly declined to consider the affidavit under the facts of this case.

Petitioner was tried by a jury of six whites and six blacks. Spencer, 260 Ga. at 643, n.2. This Court is well familiar with the operation of Georgia's capital sentencing scheme which requires the jury to find the existence of at least one statutory aggravating circumstance in order to impose a death sentence. Zant v. Stephens, 462 U.S. 862, 876 (1983). Furthermore, the jury's verdict must be unanimous, as the jury was so charged in this case. (T. 1018-19, 1023). Allen v. State, 253 Ga. 390, 393(2), 321 S.E.2d 710 (1984). Petitioner's death sentence rests upon the jury's finding of three statutory aggravating circumstances: Petitioner had a prior conviction of a capital felony of rape, the murder was committed while Petitioner was in the lawful custody of a police officer, and the murder was committed for the purpose of avoiding custody in a place of lawful confinement. O.C.G.A. §17-10-30(b)(1); (b)(9); and (b)(10).

Post trial, new counsel for Petitioner sought to show that his convictions and death sentence were the result of racial discrimination through the proffer of the hearsay affidavit of

juror Ella Pearl Moore who contended she was a member of the jury and overheard one identified female white juror and a second unidentified white male juror make some racial comments during deliberations. (R. 879-80). The affiant then contends she "knew" what was in the minds of some of the other jurors by her assertion, "I know that race and racial bias was a significant factor that some of the jurors used in reaching their decision in this case." (R. 879). Such an assertion would otherwise be rendered incompetent as this juror cannot possibly know what was in the minds of other jurors and, thus, was stating matters beyond her own personal knowledge. The trial court declined to consider the affidavit, relying upon O.C.G.A. §17-9-41 which prohibits a juror from impeaching his verdict. (Motion for New Trial Transcript, Sept. 22, 1988, p. 122-28). The trial court left the affidavit under seal and refused to read it on the basis that the affidavit sought to impeach the verdict.

O.C.G.A. §17-9-41 provides, "The affidavits of jurors may be taken to sustain but not to impeach their verdict." The Georgia Supreme Court found no abuse of discretion in the trial court's refusal to consider the affidavit. Spencer, 260 Ga. at 643-44. The court reviewed the "important public interests" that this long-standing rule promotes, as the "rule discourages post-verdict harassment of jurors, enhances verdict finality and certainty, encourages free and open discussion among jurors

during deliberations, and insulates jury value judgments from judicial review." Id. at 643. The court further noted that the rule "is not absolute" as it may yield to allow inquiry "in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interefered with the jury's deliberations." Id. at 643.

Indeed, the court cited to Federal Rule of Evidence 606(b), which similarly bars post-verdict inquiry into jurors' mental processes and which was the subject of Tanner v. United States, 483 U.S. 107 (1987). In Tanner, this Court noted that this similar federal rule "is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." Tanner, 483 U.S. at 121. In Tanner, this Court declined to order a federal evidentiary hearing on whether jurors used alcohol and drugs during the trial and deliberations and to permit evidence from jurors themselves. Id.

The Georgia Supreme Court in this case concluded that the rule in question "is sufficiently race-neutral that further protection [to assure equal justice] is not required, and that the evidence in the present case did not reach a level that would justify disregarding the rule." Spencer, 260 Ga. at 644. The court further assumed for purposes of argument that the affidavit was true and concluded that it "shows only that

two of the 12 jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die." Id. The court found that other than the affidavit, Petitioner "offered no evidence that racial bias affected the jury's decision," and compared this case to Dobbs v. Zant, 720 F. Supp. 1566 (N.D. Ga. 1989). Id.

Under McCleskey, Dobbs was permitted to depose jurors in an effort to establish whether "jurors acted with discriminatory purpose when they decided to impose the death penalty." Even that court, however, noted that "only certain types of prejudice" would entitle a habeas corpus petitioner to relief from sentence and then reviewed the entire record in that case including voir dire at trial; the "lengthy deposition questioning" on the topic of racial views in the juror depositions; the racial composition of the jury (10 of 11 deposed jurors were white); the fact that most jurors found racial slurs were insulting although two had admitted using a particular word on occasion with only one intending the use to be negative; responses on jurors' attitudes towards blacks as a whole and concluded that Dobbs "has not shown a risk of racial prejudice affecting the sentencing decision to the extent that the death penalty was given unconstitutionally." Dobbs, 720 F. Supp. at 1579. "Dobbs has not shown that the jurors, either individually or as a whole, were influenced by prejudices that

would make them favor the death penalty for a black person who murdered a white person." Id. That case is currently pending in the Eleventh Circuit.

Further, in Tanner this Court noted that "the suitability of an individual for the responsibility of jury service, of course, is examined during voir dire." 483 U.S. at 127. Petitioner here does not complain of any restrictions on voir dire regarding racial bias. Indeed, the only such assertion raised on direct appeal was that the trial court allegedly restricted the questioning of prospective R. A. Joseph, who Petitioner contended in another error should have been excused for cause based upon his knowledge of the case. Trial counsel told the court he wanted to explore racial bias with this prospective juror, and the court told counsel to ask the question and "then maybe you'd have an answer to it." (T. 43-44). Counsel asked the prospective juror if the juror were biased, and the juror replied he did not think he was. Counsel did not seek to propound any other questions regarding racial bias. Petitioner raised no other contentions regarding the alleged restrictions on voir dire on this subject, and the state court on appeal found they lacked merit. Spencer, 260 Ga. at 641(d). Thus, Petitioner had the additional safeguard in this case of an inquiry into racial bias on voir dire.

Respondent submits that the decision of the Georgia Supreme Court is proper under the facts of this case. Given the long

standing policies against instrusion into jurors' mental processes, the strength of the evidence against Petitioner, the racial composition of this jury, and the fact that they returned three statutory aggravating circumstances to support their sentence of death for malice murder, Respondent submits that Petitioner has even failed to establish sufficient a basis under McCleskey which would have warranted any further inquiry into jurors' mental processes. For these reasons, Respondent would urge this Court to decline to grant certiorari on this issue.

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CONSIDER A PROCEDURALLY DEFAULTED CHALLENGE TO THE PROSECUTOR'S USE OF PEREMPTORY STRIKES.

In this second question presented for review, Petitioner urges this Court to grant certiorari to consider the merits of his challenge to the prosecutor's use of strikes under Batson v. Kentucky, 476 U.S. 79 (1986). Petitioner ignores the fact that the Georgia Supreme Court found the claim was procedurally defaulted because Petitioner first raised it after trial in his second amended motion for new trial or, alternatively, urges this Court to conclude that the rule relied upon is inadequate. Respondent submits that a review of the facts of this case shows that this case is readily distinguishable from Ford v. Georgia, ___ U.S. ___, 111 S.Ct. 850 (1991), and that the procedural default rule was correctly applied in this case so that this Court should decline to grant certiorari.

Unlike Ford, here, counsel filed no pretrial motion seeking to restrict the prosecutor's use of peremptory strikes upon black venireman. Further, no objection was raised by trial counsel for Petitioner before, during or following the striking of the jury. (T. 611). The jury was then sent out

without being sworn, and a unified appeal hearing was held during which the prosecutor asked whether a Batson objection was being raised. (T. 612-17). The following colloquy between the trial court and defense counsel occurred:

> The Court: Of course, I advised counsel about that in the beginning, and I saw no evidence of that. If you want to make any record, I'll let you make it at this time.
>
> Mr. Allen [defense counsel]: Your Honor, I would like to just reserve that objection, if I may. I really haven't had a chance to even consider it at this moment in time.
>
> The Court: All right, sir, there is no objection at this time. All right, bring the jury back, please.

(T. 617-18). The jury was brought in, sworn in, and then the prosecutor began his opening statement. (T. 618).

Trial counsel thereafter never asserted any Batson claim. Instead, the Batson challenge was first raised on June 8, 1988,

in the second amended motion for new trial by new counsel for Petitioner. (T. 190, 202 p. 17). The trial occured on August 31-September 3, 1987, approximately nine months before. The claim was reasserted in the third and fourth amended motions for new trial filed, respectively, on June 8, 1988, and September 16, 1988. Id. at 229, 707.

Further, like Ford, because of the change of counsel at the motion for new trial level, the ineffectiveness of trial counsel issue has already been litigated. Unlike Ford, however, here this record discloses trial counsel's strategy regarding any Batson challenge, and trial counsel specifically did stated he did not raise a Batson challenge because he did not see a need to raise such a challenge. (Motion for New Trial Transcript, Sept. 22, 1988, p. 82-88). Trial counsel Allen recalled that the prosecutor struck as many blacks as whites and that the composition of Petitioner's trial jury was six whites, six blacks and two black alternate jurors. Id. at 83. Trial counsel Allen initially considered making a Batson challenge but "after we looked at everything, when we looked at everything, we didn't think it was there." Id. Trial counsel "felt comfortable with the results." Id. at 85. Trial counsel also concluded that Batson was not violated after he reviewed decisions dealing with Batson and because the prosecutor here did not strike every black. Id. at 87. Thus, despite having attempted to "reserve" any objection in the heat of trial,

trial counsel ultimately made an informed, tactical decision not to raise a Batson challenge.

On direct appeal, the Georgia Supreme Court concluded that any Batson claim was not preserved for review due to the lack of a timely challenge. Spencer, 260 Ga. at 641-43. The court rejected Petitioner's argument that his Batson challenge was not defaulted on the basis that the trial court had allegedly "permitted" defense counsel to reserve the right to raise a Batson challenge. Id. The state had asserted on direct appeal that there was no authority under state law to allow Petitioner to reserve a Batson objection as state law permits trial counsel to "reserve" objections to the trial court's charge on the case in chief prior to submitting the case to the jury for deliberation. Foshee v. State, 256 Ga. 555(2), 350 S.E.2d 416 (1986). The Georgia Supreme Court held that "the trial court did not explicitly allow counsel to reserve his objection; the court only noted there was no objection 'at this time.'" Spencer, 260 Ga. at 642. The Court noted that even if the trial court's remarks were "liberally construed to implicitly grant the defendant some additional time" to make such a challenge, the court did not think that the response could be interpreted to allow the defendant to wait till after trial and raise such a challenge in one of his amendments to the motion for new trial. Id.

At the time Petitioner's case was tried in August 1987, the Georgia Supreme Court had held in Childs v. State, 257 Ga. 243, 257(21), 357 S.E.2d 48 (1987), that a Batson claim must be raised in a timely matter and that after trial was too late. Childs was decided on June 18, 1987. The rule of State v. Sparks, 257 Ga. 97, 355 S.E.2d 658 (1987), which this Court examined in Ford to conclude it was not properly applied in Ford's case, was decided May 19, 1987, more than three months prior to the commencement of Petitioner's trial. In Ford itself, this Court did not invalidate the prospective rule announced in Sparks - i.e., that "any claim under Batson should be raised prior to the time the jurors selected to try the case are sworn." Ford, 111 S.Ct. at 858, quoting Sparks, 257 Ga. at 98.

Petitioner now seeks to circumvent Sparks by asserting it was not "firmly established" at the time of Petitioner's own trial. This Court has never explicitly decided how long a rule must be in effect in order for it to be firmly established. Instead, this Court has simply noted that novelty in procedural requirements cannot bar review of a federal question. Ford, 111 S.Ct. 857-58. However, Respondent poses the question of how a rule may become "firmly established" if it is questioned at every application despite the fact that in a case such as here, the rule had been clearly announced and consistently applied by the Georgia Supreme Court as in Childs, where the

Batson claim was first raised after trial so that the claim was deemed untimely. Indeed, in Ford, this Court observed, "Undoubtedly, then, a state court may adopt a general rule that a Batson claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected." Ford, 111 S.Ct. at 857. Thus, where Petitioner was tried clearly after the announcement of the prospective Sparks rule; where an additional case had alerted trial counsel that raising a Batson claim after trial was too late; and where trial counsel made a reasoned, tactical decision not to raise a Batson claim but the claim was instead asserted by new, post-conviction counsel nine months after the actual trial of this case, Respondent submits that the procedural bar applied by the Georgia Supreme Court in this case constitutes an independent and adequate state ground.

Respondent further notes that the Georgia Supreme Court never went to the merits of the Batson claim so that Petitioner's reliance upon the footnote is misplaced. Specifically, the Georgia Supreme Court concluded, "We hold this claim is not preserved for review." Spencer, 260 Ga. at 643. In a footnote, the Court noted that "the trial jury was evenly split racially, and trial counsel testified at the hearing on the motion for new trial that he 'did not see a need to raise a Batson challenge.'" Id. at 643 n. 2. The state appellate court never went to the merits of the Batson claim.

Rather, it is clear that the court explicitly relied upon the state procedural bar. Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1044 n. 10 (1989).

Finally, Petitioner seeks to circumvent the procedural bar by noting that the prosecutor allegedly went to the merits of the Batson claim at the motion for new trial level. As Respondent vigorously asserted in Ford, Georgia does not have a "waiver by the state" rule. Rather, the plenary powers afforded the Supreme Court of Georgia allows that court to correct any error which may occur below, which may include deciding whether a procedural bar should be applied. For these additional reasons, Respondent would urge this Court to decline to grant certiorari to consider the defaulted Batson challenge.

III. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CONSIDER THE LACK OF INSTRUCTION ON A LESSER-INCLUDED OFFENSE WHERE THERE WAS NO EVIDENCE TO WARRANT A VOLUNTARY MANSLAUGHTER INSTRUCTION UNDER STATE LAW.

Petitioner urges this Court to grant certiorari to consider whether the Georgia Supreme Court has allegedly, on a case-by-case basis, sought to circumvent Beck v. Alabama, 447 U.S. 625 (1980), regarding the charging of lesser included offenses in capital cases and its decision that no voluntary manslaughter charge was authorized by the facts of this case. The Georgia Supreme Court relied on Hopper v. Evans, 456 U.S. 605 (1982), wherein this Court clarified Beck to require that in capital cases, lesser included offenses must only be charged if supported by the evidence, in concluding that under these facts no charge on voluntary manslaughter was required.

Voluntary manslaughter is defined under Georgia law as follows:

> A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the

result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an intervel between the provocation and the killing sufficient for the voice of reason and inhumanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and shall be punished as murder.

O.C.G.A. §16-5-2.

Provocation by words alone is inadequate to reduce murder to manslaughter, even if profane language is used. Hunter v. State, 256 Ga. 372, 349 S.E.2d 389 (1986); Aguilar v. State, 240 Ga. 830, 242 S.E.2d 620 (1978). The proximity of threats from a victim that he was going to get the defendant and then threatening movements may constitute sufficient provocation to warrant an instruction. Moore v. State, 228 Ga. 662(1), 187 S.E.2d 277 (1972); Tew v. State, 179 Ga. App. 369, 346 S.E.2d 833 (1986). Georgia law does provide that it is not necessary to voluntary manslaughter that the defendant had been acting in self-defense. Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632 (1986).

The facts in this case show that some time elapsed between the malice murder and the aggravated assault. Petitioner claimed that when the message came over the police car radio that Petitioner had a gun, Petitioner claimed he did not have the intent to kill and that he was "frightened" and "panicked" after he heard the radio transmission. (T. 846-47). Petitioner shot deputy Beasley five times, the aggravated assault. The murder of Mr. Williams occured sometime later as the deputy and Mr. Williams had gotten away from the police car and Mr. Williams had apparently walked back up to the vehicle. (T. 712-13). Leslie Padgett had seen Mr. Williams, who he described as an elderly gentlemen, go from his place behind the police car to the passenger side of the stopped vehicle, lean over into the car, and "when Mr. Williams stuck his head in the car, the guy that was in the backseat just put the pistol up to his head and pulled the trigger, shot him point blank." (T. 713).

Petitioner testified at the guilt/innocence phase as follows:

> For some reason, Mr. Williams came back to the car. Came back to the passenger side of the car, to the front seat, and I shouted, "Get away from the car, old man. I don't want to shoot you", and he

started to leave. And again, he decided against that, and decided that he would try a second time. I said, "Get away, old man. I do not want to shoot you." He reached for the pistol on the dash, and when he did, the only thing I could think of was to keep him away from the gun, and I shot Mr. Williams. But, I didn't want to shoot Mr. Williams. I didn't want to shoot Mr. Beasley [the deputy]. But I did that. I shot both Mr. Beasley and I shot Mr. Williams. As a result, Mr. Williams died, and Mr. Beasley, he has suffered because of me. I didn't want to do that, but I'm not sitting here trying to deny the fact that I did. I did do that.

(T. 846-47).

Respondent submits that under these facts, the trial court was clearly authorized to decline to charge on voluntary manslaughter as there was no evidence to warrant such an instruction. It is clear that Petitioner was not acting out of passion or hot blood or from provocation but acting more analogous to self defense in allegedly trying to keep Mr. Williams from the gun. Self defense is justifiable homicide,

and if the jury believed such a story, it would return a verdict of not guilty, not a verdict of voluntary manslaughter.

Moreover, there is no evidence of any threats by the victim before Petitioner shot him. Georgia law requires both threats accompanied by provocative conduct for a voluntary manslaughter charge. Houston v. State, 256 Ga. 276, 278, 347 S.E.2d 556 (1986). Petitioner's reliance upon Washington v. State, 249 Ga. 728, 731, 292 S.E.2d 836 (1982), is misplaced as Washington involved both threats from the victim accompanied by provocative conduct. While Washington recognizes that "fear of some danger can be sufficient provocation to excite passion," cases since Washington have made very clear that there must be both threats from the victim and provocative conduct. See, e.g., Veal v. State, 250 Ga. 384, 385(1), 297 S.E.2d 485 (1982); Saylors v. State, 251 Ga. 735(2), 309 S.E.2d 796 (1983); Coleman v. State; Hunter v. State, 256 Ga. 372(2), 349 S.E.2d 389 (1986); Hambrick v. State, 256 Ga. 688(2), 353 S.E.2d 177 (1987). Thus, under these facts, Respondent submits the Georgia Supreme Court correctly concluded that no voluntary manslaughter instruction was required by Hopper v. Evans as there was no evidence to warrant an instruction. Spencer, 260 Ga. at 643. Thus, Petitioner's claims of inconsistent application of this rule fail.

Petitioner urges this Court to grant certiorari on this issue in light of Schad v. Arizona, ___ U.S. ___ 111 S.Ct. 243 (1990), wherein this Court granted certiorari to consider whether a state may avoid Beck v. Alabama by "denying that a necessarily included offense is a 'lesser included offense' under state law." Respondent submits that Schad is readily distinguishable from the instant case. The Arizona court held, "Although we agree with the defendant that the evidence supported an instruction and conviction for robbery, we disagree that the underlying felony supporting a felony murder conviction requires a lesser-included offense instruction and form a verdict." Schad v. Arizona, 788 F.2d 1162, 1168 (Ariz. 1989). In the instant case, the Georgia Supreme Court found that there was simply no evidence to warrant an instruction on voluntary manslaughter not that there was supporting evidence but another state rule barred its being charged. Again, relying on Hopper v. Evans, Respondent would urge this Court to decline to grant certiorari on this issue.

IV. THIS COURT SHOULD DECLINE TO CONSIDER A FEDERAL QUESTION REGARDING THE ALLEGED EXCLUSION OF MITIGATING EVIDENCE WHICH WAS NOT REACHED BELOW.

In the final issue presented for review, Petitioner urges this Court to grant certiorari to consider the affirmance by the Georgia Supreme Court of the trial court's denial of Petitioner's motion for continuance during the sentencing phase of trial. Petitioner sought a continuance to allow an out of state witness to arrive, whose whereabouts were unknown at the time counsel made the request. Respondent submits that the Georgia Supreme Court properly resolved the factual premise adversely to Petitioner and did not need to reach any federal question so that this Court should decline to consider a federal question which was not decided below.

As the rule of sequestration was invoked at the beginning of the sentencing phase of trial, Petitioner stated that all other mitigating witnesses were present with the exception of "one other witness, who was flying in from Oregon and her plane will not be here until about 4:00 o'clock." (T. 947). Counsel then stated that he had sent her money for her flight and that counsel "expected to reach her late this afternoon or first thing tomorrow morning." (T. 947-48). Counsel indicated that

this witness' testimony was essentially that "she and her family have corresponded with James Spencer, corresponded letters back and forth. They had visited with him at the jail. She can testify what she has seen in terms of change in his attitude in life over the last nine years." (T. 950). The trial court told counsel to proceed "with what you've got, put that up and then we will see where we are going after that and see what the situation is with reference to time." (T. 952). Petitioner then called the chaplain at the prison where Petitioner had been incarcerated who regularly visited, observed and talked with Petitioner as well as Petitioner's mother. (T. 953; 963).

The trial court then brought up the matter again by asking defense counsel when he counsel had first known he would be calling this person, with counsel indicating he had "known this for several weeks." (T. 971). The trial court ascertained why this witness had not been told to be present earlier, and counsel indicated the witness was employed and they were trying to coordinate flights and save money as counsel was advancing the funds. (T. 971-73). Counsel then admitted that he had not sought funds from the court to secure the presence of this out of state witness as is permitted under O.C.G.A. §24-10-90 et seq. (T. 973). When asked if the witness had even left Oregon, counsel stated that he did not really know as he had encountered "some difficulty communicating back and forth with

this witness." (T. 975-76). The trial court noted that this was the first time the matter had been broached, that the court had provided funds and assistance to Petitioner on other matters and that if the court had been so informed, the court might have provided funds for that purpose. (T. 976-77). The trial court granted Petitioner a 30 minute recess to determine whether the witness had left Oregon, when she would arrive, and also gave Petitioner the option of profferring her testimony to the jury in writing. (T. 979-80). Upon reconvening, Petitioner still had no idea about the whereabouts of the witness and profferred her testimony. (T. 980-85). Court then reconvened with the parties giving closing argument, the trial court charging the jury, and the jury ultimately returning its verdict of a death sentence.

On appeal, the Georgia Supreme Court held as follows:

> The trial court did not abuse its discretion by refusing to grant a continuance at the sentencing phase of the trial to await the arrival of a witness who was not under subpoena, whose whereabouts were not known for sure, who had corresponded with the defendant but had only seen him a few times in prison, and whose possible

testimony the court was informed about only on the afternoon of the last day of trial. See Wilson v. State, 250 Ga. 630(a) (300 S.E.2d 640) (1983); O.C.G.A. §17-8-25.

Spencer, 260 Ga. at 652(16).

O.C.G.A. §17-8-25 provides grounds for the granting of a continuance upon the absence of a witness which requires a showing, which includes in pertinent part, that the witness is absent; that he has been subpoenaed; that he does not reside more than one hundred miles from the place of the trial by the nearest practical route; that his testimony is material; that the witness is not absent by the permission, directly or indirectly of the applicant..." and where the applicant must state what would expect to be proved by the testimony of the absent witness.

In this case, Respondent submits that it is clear that this issue was resolved solely under state law so that no federal question is presented for review by this Court. This Court has recognized the wide latitude to be afforded trial judges in scheduling trials. Morris v. Slappy, 461 U.S. 1, 11 (1983). Where here the trial had progressed to almost completion, Petitioner could not state the whereabouts of his witness nor assure her arrival. Respondent submits that Petitioner had failed to establish a compelling reason for a continuance at that point. Id. Accordingly, Respondent submits no federal question is presented for review under this issue.

CONCLUSION

This Court should decline to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that the federal questions presented to this Court for review were correctly decided under precedent of this Court, that no novel federal questions are presented, and that no federal question is raised by an issue resolved solely on state law.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 25th day of April, 1991.

Paula K. Smith

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Assistant Attorney General

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

No. 90-7435

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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Pursuant to Supreme Court Rule 15.6, petitioner James Lee Spencer submits this reply brief to address the arguments first raised in Respondent's Brief in Opposition to Mr. Spencer's petition for certiorari to the Supreme Court of Georgia.

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN GEORGIA'S VERDICT IMPEACHMENT RULE AND PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Spencer's petition requests that this Court grant certiorari to decide whether Georgia's verdict impeachment rule may be applied to bar Mr. Spencer's McCleskey claim or to impose an almost insurmountable evidentiary barrier to a capital defendant's ability to prove that his conviction and sentence were unconstitutionally tainted by racial considerations. Petition at 10-18. Respondent's opposition for the most part simply recites the rationale of the Georgia Supreme Court's decision and ignores the issue Mr. Spencer is asking this Court to review. To the extent that respondent urges new grounds not relied on by the Georgia Supreme Court, these points do not present any reason for the Court to decline to grant certiorari in this case.

Respondent first contends that consideration of the juror affidavit presented by Mr. Spencer in support of his constitutional claims was unwarranted because Mr. Spencer was tried by a jury of six blacks and six whites. Brief in Opposition at 15, 20. This point is simply immaterial to the issue presented for review. The juror affidavit shows that racial bias affected at least two jurors' decisions to convict and sentence Mr. Spencer to death. The fact that

six of the remaining jurors were black does not somehow cure this constitutionally forbidden effect.

Respondent also contends that the juror affidavit may be disregarded because the jury found three statutory aggravating circumstances. Brief in Opposition at 15, 20. This point is also without merit. This Court has recognized that racial prejudice in the form of preconceived notions about blacks in general may improperly influence a juror to find aggravating circumstances in the case of a black defendant. Turner v. Murray, 476 U.S. 28, 35 (1986). It is certainly likely, based on the juror affidavit presented here, that such an improper influence operated in this case.

Moreover, respondent's recital of the aggravating circumstances completely ignores the likely effect of racial prejudice on the other phases of the sentencing process. As this Court recognized in Turner, a juror harboring racial prejudice may be less favorably inclined than an unbiased juror toward a defendant's evidence of mitigating circumstances. Id. Most importantly, racial prejudice may influence the juror's exercise of his discretion in the ultimate decision to sentence the defendant to death. Id. ("Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty."). Thus, the fact that the jury found three aggravating circumstance in this case does not

in any way reduce the likelihood that racial prejudice affected the jury's decision to impose the death sentence.

Finally, respondent invokes the availability of voir dire on the subject of racial bias as a reason to disregard the juror affidavit. Respondent's reliance on the supposed effectiveness of the voir dire is much like arguing that the barn door was closed after the horse has already run away. Whether or not the voir dire in this case was constitutionally sufficient,[1] it is clear that the voir dire did not serve its purpose of eliminating biased jurors. See Turner v. Murray, 476 U.S. at 35-36. Mr. Spencer seeks this Court's review of the issue presented by the presence of biased individuals on his jury.[2] The voir dire is relevant to this issue only insofar as it provides additional evidence that racial prejudice was a factor in Mr. Spencer's

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1 Respondent incorrectly states that "Petitioner here does not complain of any restrictions on voir dire regarding racial bias." Brief in Opposition at 19. In fact, Mr. Spencer's petition to this Court expressly cites the trial court's restriction of voir dire as additional evidence that racial bias affected Mr. Spencer's case. Petition at 17. The trial court improperly restricted Mr. Spencer's voir dire regarding racial bias, thus increasing the risk that racial bias would affect his conviction and sentence, and Mr. Spencer challenged the trial court's restrictions on voir dire on direct appeal as a separately enumerated error as well as a basis for supporting his McCleskey claim.

2 Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986) (if members of petit jury are biased, it is never harmless error); see Ross v. Oklahoma, 108 S. Ct. 2273, 2277 (1988) (had the biased panel member sat, sentence would have to be overturned).

trial. It certainly does not cure the fact that two racially biased jurors made it through the voir dire and permitted racial prejudice to affect their decision to sentence Mr. Spencer to death.[3]

II.

PETITIONER'S BATSON CLAIM
IS NOT PROCEDURALLY DEFAULTED

Mr. Spencer's petition requests that this Court grant certiorari to decide whether the Georgia Supreme Court properly applied this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986). Respondent's opposition does not address the merits of this issue, but instead contends only that Mr. Spencer's Batson claim was procedurally defaulted. Brief in Opposition at 21-27.

Mr. Spencer's petition demonstrated that there was no procedural default because the Batson claim was raised in the trial court and decided on the merits. Petition at 23-27. The procedural "rule" at issue here is the Georgia

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3 Respondent also tries to suggest "that Petitioner has even failed to establish sufficient a [sic] basis under McCleskey which would have warranted any further inquiry into jurors' mental processes." Brief in Opposition at 20. The affidavit submitted by Mr. Spencer, however, fully meets the requirements of this Court's decision in McCleskey. See Petition at 14-15. Moreover, in connection with his motion for new trial, Mr. Spencer filed an omnibus motion seeking further evidence of racial bias on the part of the jury and the District Attorney. R. at 169-78. The trial court denied that motion in its entirety. R. at 672-73.

Supreme Court's finding on appeal that Mr. Spencer's Batson claim was waived despite the fact that (1) Mr. Spencer raised the issue in the trial court, (2) the state did not argue to the trial court that it was waived and (3) the trial court denied the claim on the merits. Respondent does not contend that this "rule" was "firmly established" as required by this Court's decision in Ford v. Georgia, 111 S. Ct. 850 (1991).[4] Respondent instead attempts to avoid the point altogether by misconstruing Mr. Spencer's petition as asserting that the rule in State v. Sparks, 257 Ga. 97, 98, 355 S.E.2d 658, 659 (1987), was not "firmly established" at the time of Mr. Spencer's trial. See Brief in Opposition at 25. However, the Sparks rule is not at issue here because even respondent concedes that Batson was first raised prior to the time the jurors selected to try the case were sworn. See Brief in Opposition at 21-22.

Respondent also contends that the testimony of Mr. Spencer's trial counsel at the motion for new trial hearing shows that he made a tactical decision not to raise a Batson claim. Brief in Opposition at 23-24. What respondent fails to disclose is that trial counsel's

4 In fact, the procedural rule involved in this case is contrary to the procedural rules in the Uniform Appeals Procedure used in Georgia capital cases as well as the duty the Georgia Supreme Court has assigned itself under these rules. See Newland v. State, 258 Ga. 172, 174, 366 S.E.2d 689, 692, cert. denied, 488 U.S. 975 (1988).

recollection on this matter was demonstrably incorrect. Trial counsel testified that the prosecutor struck as many blacks as whites and, based on this fact, he felt there was no Batson claim. 9/22/88 Tr. at 83. He further testified that if the prosecutor had struck only blacks, he "probably would have" made the motion. 9/22/88 Tr. at 85. In fact, it is undisputed that the prosecutor struck only blacks. R. at 439. Thus, the testimony of Mr. Spencer's trial counsel is ambiguous at best and certainly does not establish a knowing, voluntary and intelligent waiver of Mr. Spencer's Batson claim as required by the Georgia rule in capital cases. Ga. Super. Ct. R. 34.2(B)(2). The trial court was obviously of the same opinion, as it decided the merits of Mr. Spencer's Batson claim after hearing trial counsel's testimony on the subject.[5]

5 Respondent's contention that the Georgia Supreme Court never went to the merits of Mr. Spencer's Batson claim is incorrect. If this were true, there would have been no reason for the court to describe the racial composition of the jury at all.

III.

THERE WAS EVIDENCE TO WARRANT A VOLUNTARY MANSLAUGHTER INSTRUCTION

Mr. Spencer's petition requests that this Court grant certiorari to decide whether the Georgia Supreme Court's decision improperly circumvented this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980). Respondent does not attempt to defend the Georgia Supreme Court's rationale but instead argues that the decision is supported by theories not considered or relied on by the court below.

Respondent first contends that the trial court's refusal to charge on the lesser included offense of voluntary manslaughter was authorized because Mr. Spencer was acting, not from provocation that would reduce the charge to voluntary manslaughter, but "more analogous to self defense" which would entitle the jury to return a verdict of not guilty. Brief in Opposition at 31-32. Respondent's attempt to mischaracterize Mr. Spencer's arguments notwithstanding, Mr. Spencer does not argue here and did not argue below that he should have been acquitted under a theory of self-defense or justification.[6] Instead, Mr. Spencer presented evidence that, although he intentionally shot Mr. Williams, he did not do so with

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6 See Brief of Appellant to the Supreme Court at Georgia at 136 n.50.

malicious intent but instead acted because of a "sudden passion" resulting from "serious provocation." Those facts support a finding of voluntary manslaughter under Georgia law. Washington v. State, 249 Ga. 728, 730, 292 S.E.2d 836, 838 (1982); see Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632, 633 (1986) (charge of voluntary manslaughter must be given if there is any evidence, however slight, supporting the charge); cf. Saylors v. State, 251 Ga. 735, 736-37, 309 S.E.2d 796, 797-98 (1983) (defense was justification rather than provocation only where defendant admitted in his testimony that he acted in self-defense). Mr. Spencer has always contended that he acted out of fear and panic which resulted from Mr. Williams' lunge for the loaded .357 Magnum pistol on the front dashboard of the vehicle. See Petition at 31-34. The evidence submitted at trial does not show self-defense, and the jury was not charged on a self-defense theory of justification. Cf. Coleman v. State, 256 Ga. at 307, 348 S.E.2d at 633 (defendant need not show that he was acting in self-defense in order to support a finding of voluntary manslaughter).

Respondent next argues that voluntary manslaughter under Georgia law requires verbal threats accompanied by provocative conduct. This novel interpretation of Georgia law is not supported by the case law. Provocation can be conduct, or words and conduct together, that creates fear of

immediate danger in a reasonable man. Washington v. State, 249 Ga. at 730, 292 S.E.2d at 838. The fear engendered by danger is sufficient provocation to excite the passion necessary for voluntary manslaughter. Thomas v. State, 184 Ga. App. 131, 132, 361 S.E.2d 21, 23 (1987). "While a belief that the victim was about to reach for a weapon may not result in a finding of justification [self-defense], the fear of some danger can be sufficient provocation to excite passion." Washington v. State, 249 Ga. at 730, 292 S.E.2d at 838; Tew v. State, 179 Ga. App. 369, 346 S.E.2d 833 (1986).

The collection of cases respondent relies on shows -- at most -- that words alone may not be sufficient provocation for voluntary manslaughter. Hambrick v. State, 256 Ga. 688, 688-89, 353 S.E.2d 177, 179 (1987) (holding that it was error for the trial court to charge that provocation by words or gestures alone is always inadequate to reduce murder to manslaughter); Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632, 633 (1986) (reversing conviction for trial court's refusal to charge voluntary manslaughter where evidence showed that victim had attacked defendant with a butcher knife); Hunter v. State, 256 Ga. 372, 373, 349 S.E.2d 389, 389 (1986) ("appellant showed no provocative conduct on behalf of the intended victim of the appellant's shot except for a salvo of curse words directed at the

appellant"); Veal v. State, 250 Ga. 384, 385, 297 S.E.2d 485, 486 (1982) ("The evidence in the present case shows only angry words, unconnected to any threat or provocative conduct. . . ."); Huston v. State, 256 Ga. 276, 278, 347 S.E.2d 556, 558 (1986) ("There were no threats or provocative conduct of any kind by the victim. . . ."). These cases do not, as respondent suggests, establish the opposite principle -- that provocative conduct is not sufficient to support a voluntary manslaughter charge.[7]

Finally, respondent attempts to distinguish this Court's grant of certiorari in Schad v. Arizona, 111 S. Ct. 243 (1990) (order granting certiorari), to decide whether a state court can avoid the effect of Beck by failing to recognize the existence of any lesser-included offense under state law. In the decision below, the Georgia Supreme Court conceded that there was evidence in the record showing that Mr. Spencer acted out of fear and panic, thereby supporting a charge of voluntary manslaughter under Georgia law. Nonetheless, the Georgia Supreme Court sua sponte reinterpreted Georgia's voluntary manslaughter statute to hold that provocation could not exist as a matter of law because the shooting of Lett Williams occurred in the course

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7 In any event, there is evidence that, just before Mr. Williams lunged into car for the loaded gun on the desk, Mr. Beazley told Mr. Williams (in a voice loud enough to be heard by Mr. Spencer) to "[g]et the gun and help me." R. at 924-26.

of an escape attempt. Having ruled as a matter of law that there was no legal provocation, the Georgia Supreme Court could then circumvent this Court's decision in Beck by simply concluding that "the evidence fails to warrant such a charge." Appendix at a6, 260 Ga. at 643, 398 S.E.2d at 184. Thus, contrary to the situation in Hopper v. Evans, 456 U.S. 605 (1982), there was evidence in the case to support the charge of voluntary manslaughter, but under the Georgia Supreme Court's new statutory interpretation that evidence was deemed irrelevant as a matter of law. The state courts must not be permitted to redefine substantive criminal law on a case-by-case basis for the purpose of eroding the constitutional protections of Beck.

IV.

PETITIONER ARGUED BELOW THAT THE TRIAL COURT'S EXCLUSION OF RELEVANT MITIGATING EVIDENCE WAS FEDERAL CONSTITUTIONAL ERROR

Mr. Spencer's petition requests that this Court grant certiorari to consider whether the trial court's denial of a continuance and consequent exclusion of relevant mitigating evidence violated Mr. Spencer's Eighth Amendment or due process rights. Petition at 37-44. Respondent contends that the Court should not consider this issue because the Georgia Supreme Court did not reach the federal questions. Brief in Opposition at 37.

Respondent does not deny that Mr. Spencer properly raised the federal constitutional questions in the state court.[8] Under the "not pressed or passed upon" rule, this Court will refuse to consider a claim only if it was neither raised nor squarely considered and resolved in state court. Illinois v. Gates, 462 U.S. 213, 218 n.1 (1983) (citing McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940), and State Farm Mut. Automobile Ins. Co. v. Duel, 324 U.S. 154, 160 (1945)). Since there is no dispute that Mr. Spencer raised the federal questions in the state court and that these claims were denied, they may properly be considered by this Court.

8 Mr. Spencer listed the federal questions as enumerations of error and fully briefed and argued them to the trial court and to the Georgia Supreme Court. R. at 738-39; Brief of Appellant to the Supreme Court of Georgia at 246-56.

Dated: May 13, 1991

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October Term, 1990

JAMES LEE SPENCER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

CERTIFICATE OF SERVICE

I, CHARLES L. KERR, a member of the Bar of this Court and counsel of record for Petitioner in the above-entitled matter, hereby certify that on May 13, 1991, in compliance with Supreme Court Rule 29.3, one copy of the Petitioner's Reply Brief In Support of His Petition For a Writ of Certiorari to the Supreme Court of Georgia, was mailed first-class, postage prepaid, to each of the following counsel for Respondent:

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I further certify that all parties required to be served have been served.

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SUPREME COURT OF THE UNITED STATES

JAMES LEE SPENCER, PETITIONER *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 90–7435. Decided June 3, 1991

The petition for a writ of certiorari is denied.

JUSTICE KENNEDY, concurring.

A majority of the Court has voted to deny certiorari and, after initial reservations, I now concur in that judgment. This case appears to present important questions of federal law, and if I thought our decision in *Teague* v. *Lane*, 489 U. S. 288 (1989), would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari. I have confidence that petitioner's equal protection claim will not be barred in federal habeas corpus proceedings by *Teague* and its progeny, and that habeas review presents an appropriate and adequate forum for making a record and resolving petitioner's contentions.

Petitioner James Lee Spencer, a black man, was convicted and sentenced to death by a jury made up of six whites and six blacks, after the prosecutor used nine peremptory challenges to exclude black venirepersons from the jury. Petitioner argued that racial bias had infected the jury deliberations at his trial, see *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), submitting the affidavit of a juror in support of this claim. The juror alleged that other jurors uttered racial slurs concerning petitioner during deliberations. The affiant also purported to know that petitioner's race was an important factor in the decision of certain jurors to convict petitioner and sentence him to death. Though the Georgia Supreme Court's decision is somewhat ambiguous, its rejection of petitioner's *McCleskey* claim rested at least in part on Ga. Code Ann. § 17–9–41 (1990), which provides that "affida-

vits of jurors may be taken to sustain but not to impeach their verdict."

State rules of evidence have no direct application in federal habeas courts. Those courts, however, will have to determine whether the statute relied on by the Georgia Supreme Court to reject petitioner's *McCleskey* claim represents an adequate state ground for its decision, barring federal court review. See *James* v. *Kentucky*, 466 U. S. 341 (1984); *Henry* v. *Mississippi*, 379 U. S. 443 (1965); *Brown* v. *Western R. Co. of Alabama*, 338 U. S. 294 (1949); *Davis* v. *Wechsler*, 263 U. S. 22 (1923); Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1142–1145 (1986); see also *Howlett* v. *Rose*, 496 U. S. —— (1990); *Rock* v. *Arkansas*, 483 U. S. 144 (1987); *Green* v. *Georgia*, 442 U. S. 95 (1979) *(per curiam)*.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentence in this case.